

BEFORE THE COUNTY COUNCIL FOR MONTGOMERY COUNTY, MARYLAND
SITTING AS THE DISTRICT COUNCIL FOR THE MARYLAND-
WASHINGTON REGIONAL DISTRICT IN
MONTGOMERY COUNTY, MARYLAND

Office of Zoning and Administrative Hearings
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www.montgomerycountymd.gov/mc/council/hearing.html

IN THE MATTER OF:
RANDALL M. AND SHERYL B. ROTHSTEIN,
Applicant

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For the Applicant

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Attorney for the Applicants

David O'Bryon

Neither in Support nor in Opposition

Bernard Fiskien
Kathleen Fiskien
Samantha Gumenick
Jim Humphrey

In Opposition to the Project as
Currently Designed

Zoning Application No. G-865
and Development Plan Amendment
Application No. DPA 07-03

Before: Françoise M. Carrier, Hearing Examiner

HEARING EXAMINER'S REPORT AND RECOMMENDATION

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I. SUMMARY

Site Size and Location:	The subject site consists of four lots in downtown Bethesda, occupying the northeast corner of Arlington Road and Edgemoor Lane. The combined square footage is 38,079 square feet, or 0.84 acres.
Rezoning Request:	Applicants seek to rezone one of the four parcels that make up the subject site from the R-60 Zone to the TS-R Zone. The other three parcels are already in the TS-R Zone.
Development Plan to be Amended	Development Plan approved in 2001, in LMA Case No. G-779, permitting a mixed-use building with four stories, 34,900 square feet, office space on the ground floor, 12 dwelling units above, an underground parking garage and a floor area ratio of 1.2. The current Development Plan covers the three TS-R lots. Applicants seek to add the fourth lot and revise the plan to permit a larger, all-residential building.
Current Use:	The subject site contains four single-family structures, three of which are used for non-residential purposes and one of which functions as a residence.
Proposed Use:	Applicants propose a multi-family residential building with approximately 68,000 square feet, four stories, a maximum of 31 dwelling units, an underground parking garage and a maximum floor area ratio of 2.0.
Recommendations:	The Hearing Examiner, the Planning Board and Technical Staff all recommend approval, on grounds that the proposed multi-family building would be in substantial compliance with the applicable sector plan, compatible with existing and planned uses in the surrounding area, in compliance with the development standards for the zone and in the public interest.
Neighborhood Response:	The Montgomery County Civic Federation, the Villages of Bethesda and individual community members oppose this project as currently designed. They argue that the building height should be reduced to three stories/35 feet and the roof changed to a sloping roof to comply with the applicable sector plan. Residents of the Villages of Bethesda, adjacent to the north, argue that the proposed building should be set back 20 feet from their shared property line, rather than the 15 feet proposed. They contend that the decreased height and increased setback are necessary to preserve light and air for the Villages of Bethesda and to ensure compatibility.

II. STATEMENT OF THE CASE

Applications No. G-865 and DPA 07-3, filed on May 29, 2007 by Applicants Randall M. and Sheryl B. Rothstein, were consolidated for purposes of the public hearing and this report and recommendation, at the Applicants' request. Local Map Amendment Application No. G-865 requests

reclassification from the R-60 Zone to the TS-R Zone of 8,342 square feet of land located at 7425 Arlington Road in Bethesda, in the 7th Election District, known as Part of Lot 31, Block 13, Edgemoor subdivision. Development Plan Amendment Application No. DPA 07-3 seeks to amend the existing development plan that was approved by the District Council in Application G-779, in February, 2001, to add to the plan the property located at 7425 Arlington Road and to change the form of development from a four-story, mixed office/residential building with one story of office space, 12 dwelling units, and a floor area ratio ("FAR") of 1.2 to a four-story, multi-family residential building with up to 31 dwelling units and an FAR of 2.0. The existing development plan covers 28,267 square feet comprised of Lot 28, Part of Lot 29 and Part of Lot 30, Block 13, Edgemoor Subdivision. The combined gross tract area proposed in the DPA is 38,079 square feet.

The applications were initially reviewed by Technical Staff of the Maryland-National Capital Park and Planning Commission ("MNCPPC") who, in a report dated February 15, 2008, recommended *approval*. See Ex. 61. Technical Staff provided additional comments on March 6, 2008, in response to questions from the Hearing Examiner. See Ex. 67. The Montgomery County Planning Board ("Planning Board") considered the applications on February 28, 2008 and, by a vote of 4 to 0, recommended *approval*. See Ex. 72. The Planning Board recommendation stated that the proposal is consistent with the recommendations of the applicable sector plan, will be compatible with surrounding developments and complies with the purposes and standards of the TS-R Zone. The Planning Board noted that the proposed development plan amendment substantially complies with the use and density indicated in the applicable sector plan, does not conflict with other county plans and policies, and would provide the prescribed percentage of public open space and active and passive recreational areas. The Planning Board specifically found that "the design and layout of the proposed development, including the height and bulk of the building, are consistent with the recommendations of the sector plan and include amenities that will minimize adverse impact on adjacent properties." Ex. 62.

A public hearing was originally noticed for November 16, 2007 and later rescheduled, at the Applicant's request, to March 7, 2008. See Ex. 48. The public hearing was convened on

March 7, 2008, after proper notice, and continued on July 2, 2008. Evidence and testimony were presented both in support of and in opposition to the applications. In accordance with Section 59-D-1.74(d), the record closed at the conclusion of the hearing. By Resolution No. 16-661, dated July 22, 2008, the District Council extended the time for submission of this report and recommendation, at the Hearing Examiner's request, to September 15, 2008.

III. FINDINGS OF FACT

For the convenience of the reader, the findings of fact are grouped by subject matter. Conflicts in the evidence are resolved under the preponderance of the evidence test.

A. Subject Property

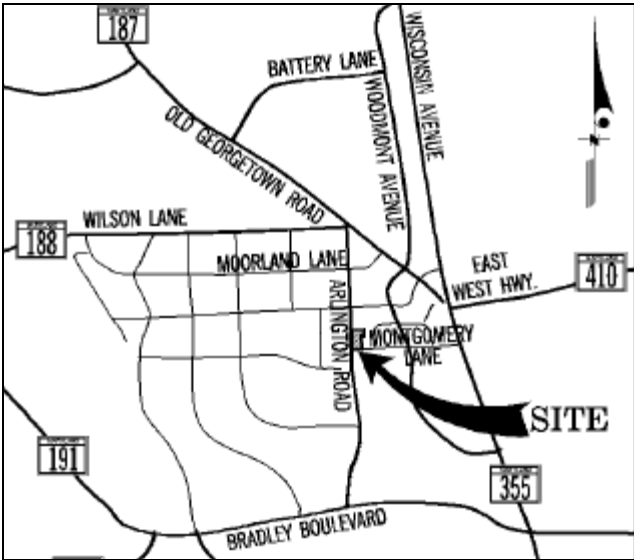
The subject property contains a total of approximately 38,079 square feet or 0.84 acres of land located on the east side of Arlington Road, at the northeast corner of Arlington Road and Montgomery Lane, about 1,200 feet southwest of the Bethesda Metro Station and directly across Arlington Road from the Bethesda Library. The property consists of four lots: Lot 28, Part of Lot 29 and Part of Lot 30, Block 13, Edgemoor Subdivision, which were reclassified to the TS-R Zone in February, 2001 in LMA No. G-779, and Part of Lot 31, Block 13, Edgemoor Subdivision, which the Applicants seek to reclassify from the R-60 Zone to the TS-R Zone and add to the development plan that was approved in LMA No. G-779. The development plan approved in G-779 has not been implemented.

Each parcel comprising the subject property is developed with a single-family structure. The structure on Lot 28 is currently in residential use, while the other three are in non-residential use, at least some of them operating under special exception. The office of Applicant Randall Rothstein is located on one of the lots. The combined subject property has approximately 227 feet of frontage on Arlington Road and 112 feet of frontage on Montgomery Lane. It is covered mostly with buildings and pavement, although there is one specimen tree on site that would have to be removed for the proposed development, and a cluster of trees along the property's eastern border that also would be removed. Applicants' land planner testified that the trees on the eastern property line would have to

be removed for construction of a building that has been approved on the adjoining property to the east, regardless of whether the present applications are approved.

The general location of the subject site may be seen on the vicinity map below.

Vicinity Map, excerpted from Ex. 95(a)



Existing development on the subject site and its relationship to surrounding uses may be seen on the aerial photograph that follows.

Aerial Photograph, Adapted from Staff Report at 6



B. Surrounding Area

The surrounding area must be identified in a floating zone case so that compatibility can be evaluated properly. The “surrounding area” is defined less rigidly in connection with a floating zone application than in evaluating a Euclidean zone application. In general, the description of the surrounding area takes into account those areas that would be most directly affected by the proposed development. In the present case, Technical Staff identified a surrounding area bounded generally by Moorland Lane to the north, Woodmont Avenue to the east, Elm Street to the South and properties fronting along the west edge of Arlington Road to the west. See Staff Report at 8. Applicants’ land planner, John Sekerak, recommended the same surrounding area that was recognized in LMA No. G-779, which rezoned much of the subject site to the TS-R Zone in 2001. That area is bound roughly by properties fronting Arlington Road and Edgemoor Lane to the north, excluding properties that front on Moorland Lane; Woodmont Avenue to the east; Hampden Lane to the south; and properties along the west edge of Arlington Road to the west. See Ex. 26(a) at 4. The two areas are very similar, except that Staff would extend the border one block farther to the south and half a block farther to the north. Either of these surrounding area designations would be appropriate. Given the limited impact the proposed development is likely to have, the Hearing Examiner accepts Mr. Sekerak’s suggestion. This area may be seen on the map reproduced on the next page.

The surrounding area as described above is primarily classified under the TS-R Zone, and contains a mix of residential uses and non-residential uses in residential structures. To the north, the subject site abuts the Villages of Bethesda (“VOB”), a townhouse community in the TS-R Zone that occupies the northern half of the block on Arlington Road and wraps around the corner onto Edgemoor Lane. Northeast of the subject site, north and east of VOB on either side of Edgemoor Lane, are two high rise buildings in the TS-R Zone known as The Chase, which front on Woodmont Avenue. Tennis courts associated with The Chase abut VOB to the east. Farther north, across Edgemoor Lane, Arlington Road is lined with single-family structures up to the next corner, at Moorland Lane. The property at the northeast corner of Arlington Road and Edgemoor Lane (the

“Funt property”) was reclassified to the TS-R Zone in LMA Case No. G-720 in 1995. The approved development plan for the Funt property, as amended in DPA 03-2 (2004, affirmed by Circuit Court decision in 2006), permits the construction of six townhouses with a flat roof, three stories above ground and an English basement. The development plan has not been implemented, however, and community member Jim Humphrey stated that the owner of the property, a dentist, continues to operate his dental practice on the ground floor and has done extensive renovations on the second and third floors, which he now uses as his home. See Tr. July 2 at 67-68.

Neighborhood Delineation Map from Ex. 26(a) at 4



Next to the Funt property is a property in the R-60 Zone with a single-family structure that is used for office purposes. The next two lots to the north on Arlington Road are occupied by

single-family structures that were reclassified to the TS-R Zone as part of the rezoning for The Christopher, a residential high-rise at the corner of Moorland Lane and Woodmont Avenue. These two lots were included on the development plan for The Christopher at their current density, so any increase in density would require an amendment to that development plan. Finally, the lot at the corner of Arlington Road and Moorland Lane is occupied by a single-family structure in the R-60 Zone. Mr. Sekerak reported that all of the single-family structures on this block of Arlington Road house non-residential uses, noting that the Funt property serves a dual residential/office function.

To the east, the subject site abuts a property owned by the Holladay Corporation that was recently reclassified to the TS-R Zone in LMA No. G-843 (2007), and has an approved development plan and site plan for construction of a six-story multi-family building (the “Holladay building”).¹ The Holladay property is currently occupied by single-family structures, some or all of which are used for non-residential purposes. These structures front on Montgomery Lane and West Lane. Farther east on Montgomery Lane are two single-family structures on the eastern side of West Lane, and the Edgemoor Condominium, a 100-story multi-family building that occupies the northwestern corner of Montgomery Lane and Woodmont Avenue. The Bethesda Central Business District (“CBD”) core area includes the Bethesda Metro Station approximately 1,000 farther east.

To the south, across Montgomery Lane, the subject property confronts a four-story multi-family building known as The Edgemoor at Arlington, which sits on land that was reclassified to the TS-R Zone in 2002, in LMA Case No. G-778. LMA No. G-778 was approved contemporaneously with G-779, the original rezoning for the southern part of the subject site. The Applicant proposes a building very similar to The Edgemoor at Arlington for the subject site, although the new building would be quite a bit larger. Abutting the Edgemoor at Arlington to the east and diagonally across from the subject site are the City Homes Townhouses, a community of large townhouses stretching almost to Woodmont Avenue. The parcels between City Homes and Woodmont Avenue were reclassified to the TS-R Zone in LMA No. G-819 (2006). These parcels are the subject of an approved development

¹ The building design steps down to four stories where it fronts on Montgomery Lane, but the portions abutting the subject property and VOB will have six stories.

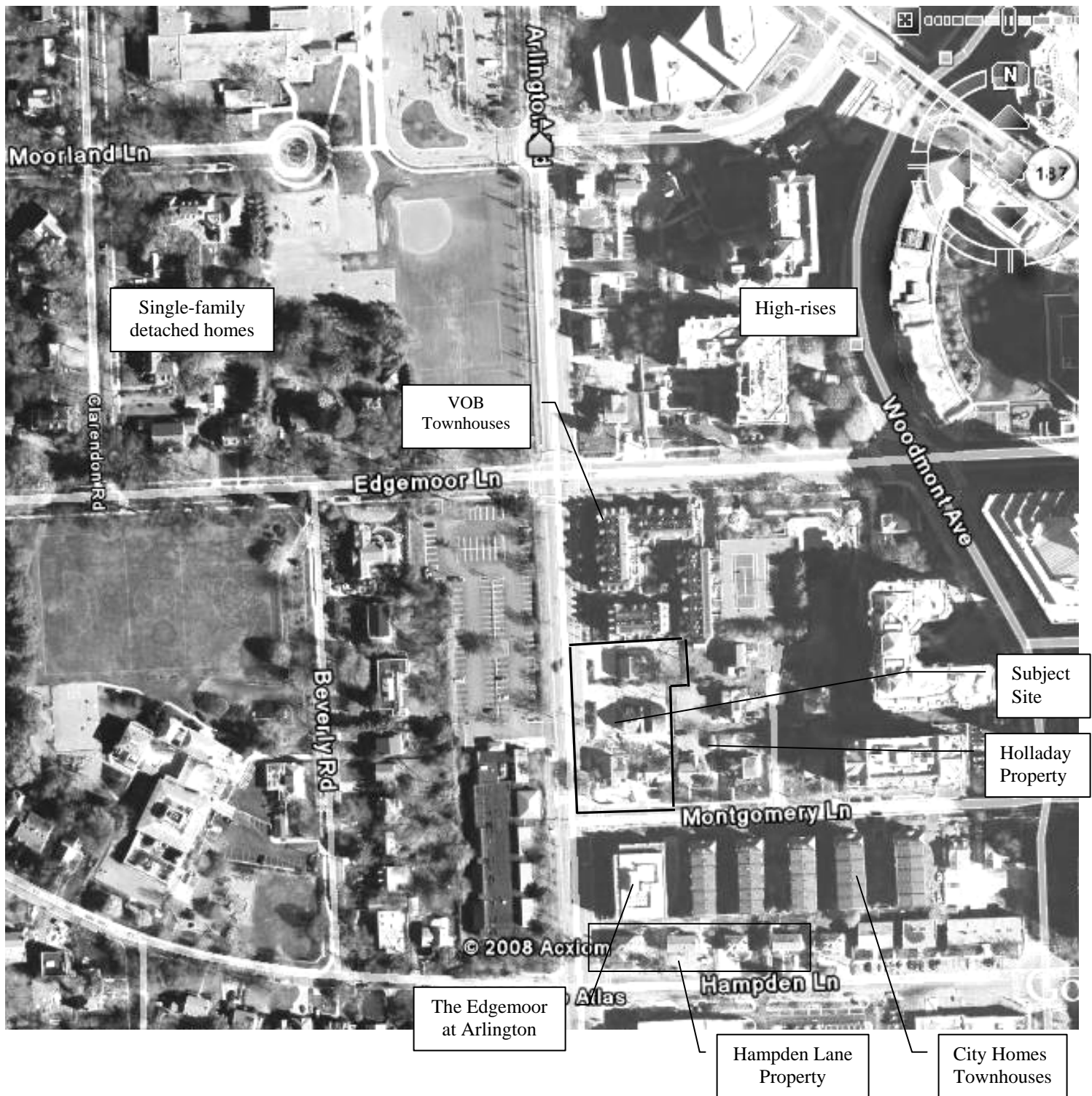
plan for the construction of a multi-family building with a height ranging from 65 to 71 feet. The development plan has not been implemented, and the land remains occupied by single-family structures used for office purposes. Abutting The Edgemoor at Arlington to the south is a long, narrow tract of land that was recently reclassified to the TS-R Zone in LMA No. G-842/DPA 06-2 (the “Hampden Lane property”). That decision approved a 60-unit multi-family building with three to four stories on Arlington Road, stepping up to seven full stories and a partial eighth story farther back along Hampden Lane.

To the west, across Arlington Road, the subject site confronts the Bethesda Library and its parking lot. To the northwest is Bethesda Elementary School. Farther west, behind the library, is the Edgemoor residential community in the R-60 Zone, a stable neighborhood of single-family detached homes. The nearest single-family home in the Edgemoor community is approximately 300 feet west of the subject property.

Zoning and development patterns in the surrounding area are reflected on the aerial photograph shown on the next page.

C. Zoning History

All of the lots comprising the subject property were classified under the R-60 Zone when the zone was enacted and mapped in the 1954 Regional District Zoning. The 1958 County-wide Comprehensive Zoning confirmed the R-60 zoning of the site. A series of special exceptions have been granted for the various lots. As noted above, the three lots closest to the corner were reclassified to the TS-R Zone in 2001 via LMA No. G-779.

Aerial Photograph Downloaded from Google Earth²

² The Hearing Examiner hereby takes official notice of the widely recognized imaging capabilities of Google Earth.

D. Proposed Development and Development Plan

The Applicant proposes to construct a single building on the combined subject site, a multi-family building with approximately 68,000 square feet, a maximum of 31 dwelling units, underground parking and a rooftop terrace. The building would have three stories and a maximum height of 35 feet in height along its Arlington Road façade, stepping up to four stories and a maximum height of 48 feet ten feet back from the front façade. The fourth story would be stepped backed five feet farther on the north and south sides of the building, providing a cascading effect at the top floor level. The maximum FAR would be 2.0, although the current design calls for an FAR of 1.8.³ The public open space requirement of the TS-R Zone would be satisfied by a plaza area in front of the building, in a 15-foot setback between the public right-of-way line and the building. The active-passive recreational space requirement would be satisfied primarily by rooftop space, as well as small open areas at ground level at the rear of the building and along its north side. The largest open area behind the building is designed to coincide with an open area on the VOB property and an open area planned for the Holladay property, to make the best use of the combined open space. The sole point of vehicular access would be on Montgomery Lane, directly across from the garage entrance for The Edgemoor at Arlington.

One unusual element of this case is that the Applicants intend to wait about eight years before constructing the building, assuming that the present applications are approved. They plan to build it and move into one of the units, but not until their children are grown.

Pursuant to Code § 59-D-1.11, development under the TS-R Zone is permitted only in accordance with a development plan that is approved by the District Council when the property is reclassified to the zone. This development plan must contain several elements, including a land use plan showing site access, the general build and height of proposed buildings and structures and their relationship to one another and to adjacent areas, gross floor area of buildings by type of use, floor area ratio ("FAR") of buildings, a preliminary classification of dwelling units by type and number of

³ The Applicants have set a higher FAR and a slightly higher maximum building height in the binding elements than what their current design calls for, recognizing the need for some flexibility in the event of unexpected physical limitations or regulatory changes at the time of site plan.

bedrooms, parking areas, land to be dedicated to public use, and land intended for common or quasi-public use but not intended to be in public ownership. Code §59-D-1.3. The development plan is binding on the Applicant except where particular elements are identified as illustrative or conceptual, and the site plan approved by the Planning Board must conform to the development plan approved by the District Council. See Code § 59-D-1.2. The Zoning Ordinance specifies that in the TS-R Zone, building height is to be determined not at the zoning stage, but during site plan review. See Code § 59-C-8.51. A maximum height may be established on the development plan, but exact building heights cannot be set at this stage.

The principal component of the development plan in this case is a document entitled “Land Use Plan for Development Plan and Development Plan Amendment,” Exhibit 95(a), hereinafter referred to as the Development Plan, which contains a drawing of the proposed site layout as well as notes, tables and written binding elements. Additional items required for a development plan have been submitted in the form of a vicinity map (Ex. 15), a preliminary forest conservation plan (Ex. 12) and a natural resources inventory/forest stand delineation (“NRI/FSD”) (Ex. 13).

Exhibit 95(a) contains all of the elements required under Code § 59-D-1. As stated in the General Notes, the building footprint and entrances are approximate. The exact building location will be determined during site plan review. Architectural features and the location of balconies and number of windows are considered illustrative, although the textual binding elements commit the Applicants to provide windows on all four facades; a building façade that is articulated with varied fenestrations; and a predominantly masonry façade, constructed primarily of brick. The textual binding elements also establish a maximum of 31 dwelling units; any required MPDUs on site⁴; a minimum building setback of 15 feet from the right-of-way for Arlington Road for the first three floors, with the fourth story set back at least another ten feet; a maximum height of 35 feet for the first three

⁴ The Development Plan does not propose a minimum number of units. Depending on the number of units built and the MPDU rules in effect at the time of site plan, it is possible that no MPDUs would be required.

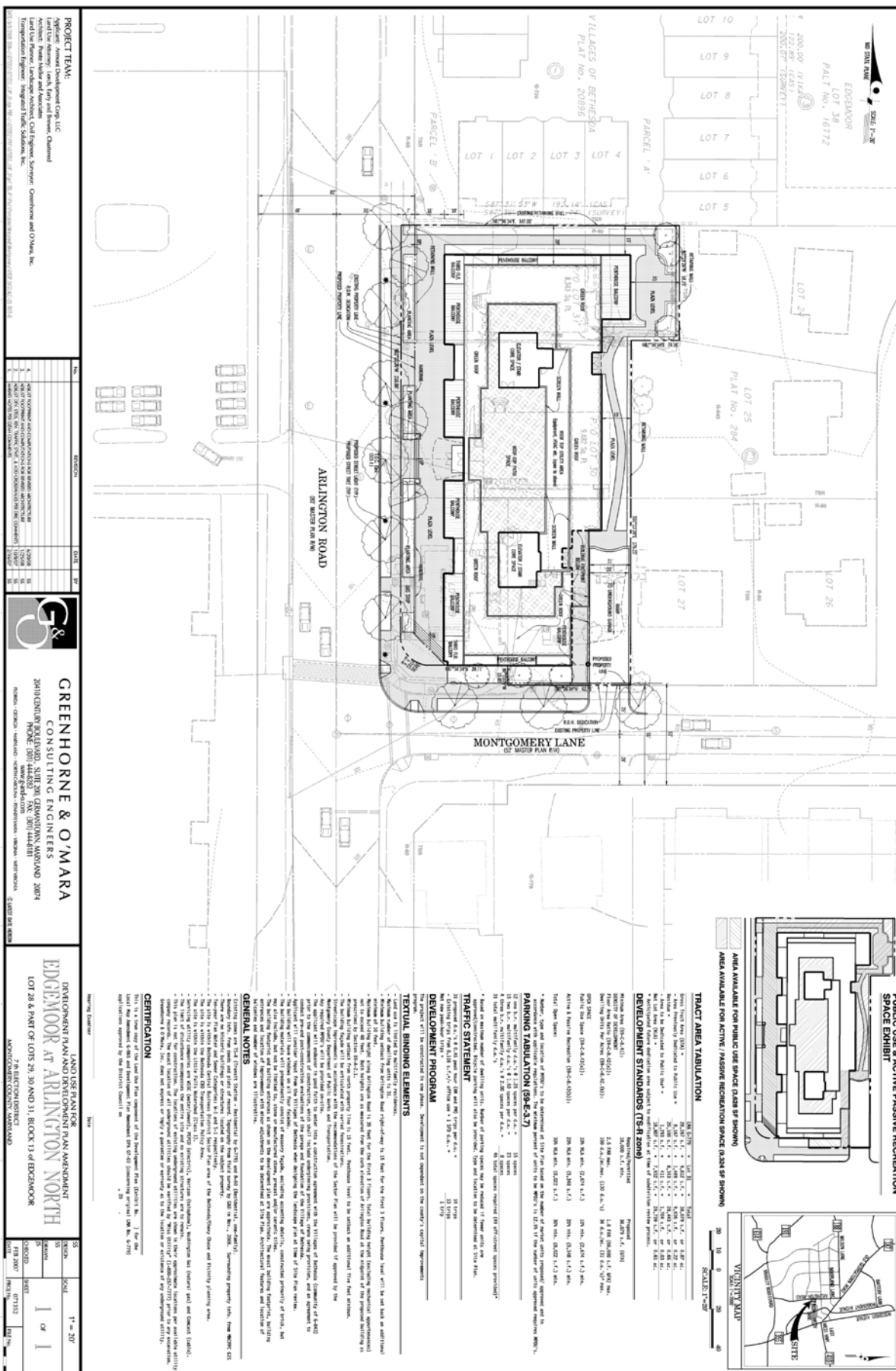
floors and 48 feet overall; and a minimum building setback of 15 feet from the north property line, with the fourth story set back at least an additional five feet. The Development Plan does not propose a minimum number of units. Depending on the number of units built and the MPDU rules in effect at the time of site plan, it is possible that no MPDUs would be required. Community member Bernie Fiskien reported that the Applicants' development team told him orally there will be only 19 units, which is just below the current MPDU threshold. See Ex. 59.

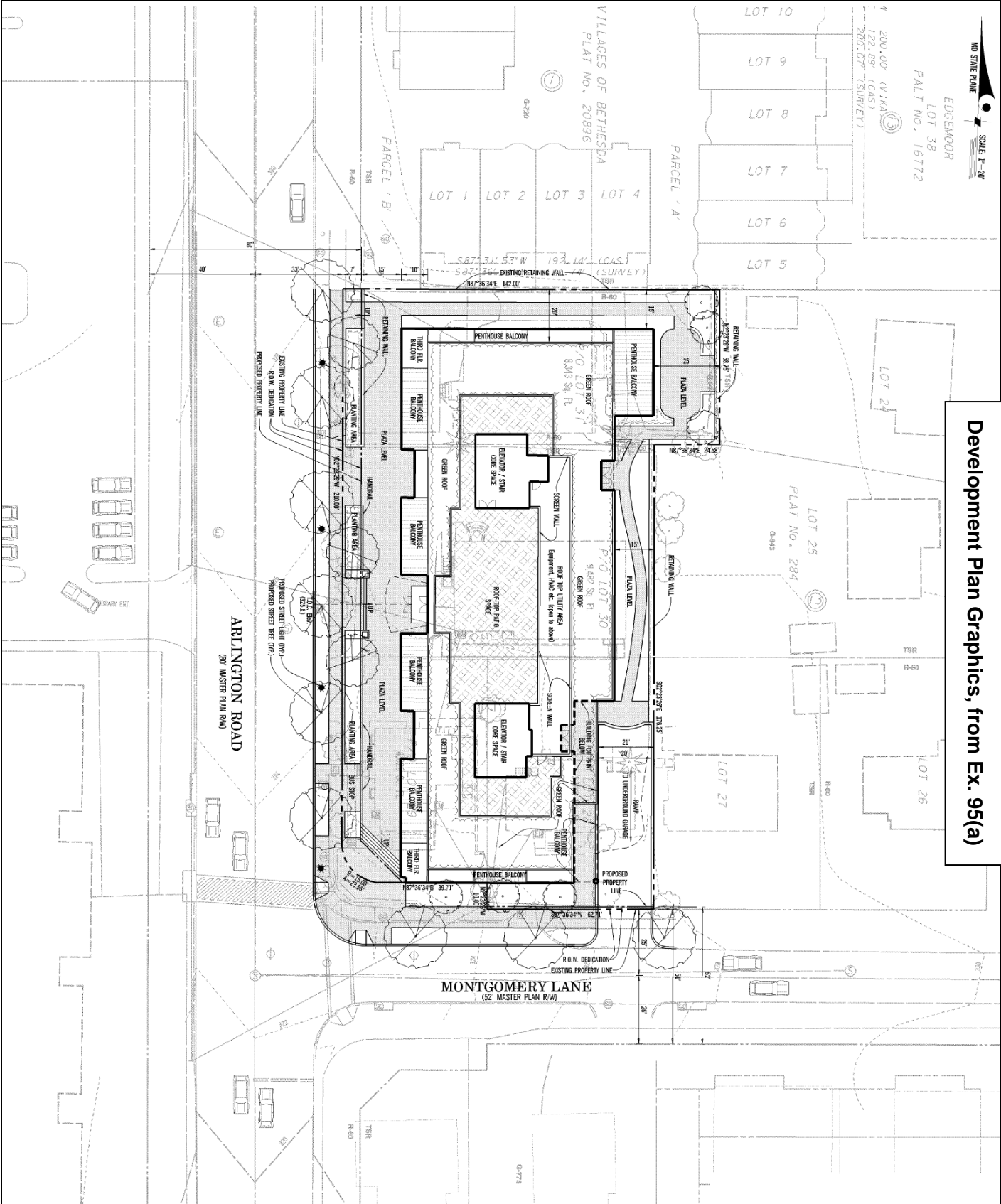
During the second hearing day, Mr. Rothstein agreed to certain additions and corrections to the textual binding elements. Because Section 59-D-1.74(d) prohibits the record from being held open in a development plan amendment case, the changes were made to the Development Plan by hand during the hearing, rather than scheduling a third hearing day to receive a typed revision. Accordingly, if the present applications are approved, the handwritten changes will have to be typed onto the Development Plan before it is submitted to the Hearing Examiner for certification. This is provided for in the recommendations at the close of this report.

The Development Plan is depicted in its entirety on the next page, and in parts, at a larger scale, on the pages that follow. The complete plan shown on the next page was taken from an electronic file that does not have the handwritten changes from the last hearing day. The plan with the handwritten changes was used where the text is provided at a larger, more readable scale.

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Development Plan, Ex. 95(a)





Development Plan Graphics, from Ex. 95(a)



Textual Binding Elements from Ex. 95(a)

TEXTUAL BINDING ELEMENTS

- Land use is limited to multifamily residences.
- Maximum number of dwelling units is 31.
- Minimum building setback from Arlington Road right-of-way is 15 feet for the first 3 floors. ~~Penthouse level~~ ^{THE FOURTH STORY} will be set back an additional minimum of 10 feet.
- Maximum building height along Arlington Road is 35 feet for the first 3 floors. Total building height (excluding mechanical appurtenances) not to exceed 48 feet. Both heights are as measured from the curb elevation of Arlington Road at the midpoint of the proposed building as prescribed by Section 59-A-2.1.
- Minimum building setback from north property line is 15 feet. ~~Penthouse level~~ ^{THE FOURTH STORY} to be setback an additional five feet minimum.
- The building facade will be articulated with varied fenestrations.
- Streetscape improvements in accordance with the recommendations of the Sector Plan will be provided if approved by the Montgomery County Department of Public Works and Transportation.
- Any required MPDU's will be provided on-site.
- The applicant will endeavor in good faith to enter into a construction agreement with the Villages of Bethesda (community of G-843) ^{TO THE NORTH} prior to the commencement of construction, which shall include underpinning provisions, crane swing provision, and an agreement to conduct pre-and post-construction evaluations of the garage and foundation of the Village of Bethesda.
- Applicant will consider input from the Villages of Bethesda when designing the landscape plan at time of Site Plan review.
- The building will have windows on all four facades.
- The building materials will predominantly consist of masonry facade, excluding accenting details, constructed primarily of brick, but may also include, but not be limited to, stone or manufactured stone, precast and/or ceramic tiles.
- The building footprint and building entrances as shown on the development plan are approximate. The exact building footprint, building entrances and location of improvements with minor adjustments to be determined at Site Plan. Architectural features and location of balconies and number of windows are illustrative.

Handwritten Addition to Textual Binding Elements Shown Below:

- MAXIMUM FAR WILL BE 2.0

GENERAL NOTES

- THE BUILDING MATERIALS WILL PREDOMINANTLY CONSIST OF MASONRY. IT MAY ALSO INCLUDE, BUT NOT BE LIMITED TO, STONE OR MANUFACTURED STONE, PRECAST AND/OR CERAMIC TILES.
- THE BUILDING FOOTPRINT AND BUILDING ENTRANCES AS SHOWN ON THE DEVELOPMENT PLAN ARE APPROXIMATE. THE EXACT BUILDING FOOTPRINT, BUILDING ENTRANCES AND LOCATION OF IMPROVEMENTS WITH MINOR ADJUSTMENTS TO BE DETERMINED AT SITE PLAN. ARCHITECTURAL FEATURES AND LOCATION OF BALCONIES AND NUMBER OF WINDOWS ARE ILLUSTRATIVE.
- Existing zones are TS-R (Transit Station - Residential by G-779)
- Boundary info. from deeds and plats of record. Topography from aerial photos.
- There are no historic buildings or structures located on the subject property.

**Tract Area Tabulation, Development Standards, Parking Tabulation,
Traffic Statement and Development Program, from Ex. 95(a)**

TRACT AREA TABULATION

LMA G-779 + Lot 31 = Total			
Gross Tract Area (GTA) *	28,267 s.f. + 9,812 s.f. =	38,079 s.f.	or 0.87 ac.
- Area Previously Dedicated to Public Use =	8,167 s.f. + 1,469 s.f. =	9,636 s.f.	or 0.22 ac.
Residue =	20,100 s.f. + 8,343 s.f. =	28,443 s.f.	or 0.65 ac.
- Area to be Dedicated to Public Use* =	1,293 s.f. + 411 s.f. =	1,704 s.f.	or 0.03 ac.
Net Lot Area (NLA) =	18,807 s.f. + 7,932 s.f. =	26,739 s.f.	or 0.61 ac.

* Anticipated future dedication area subject to modification at time of subdivision review process.

DEVELOPMENT STANDARDS (TS-R zone)

	Required/Permitted	Proposed
Minimum Area (59-C-8.41):	18,000 s.f. min.	38,079 s.f. (GTA)
DENSITY OF DEVELOPMENT		
Floor Area Ratio (59-C-8.42(a)):	2.5 FAR max.	1.8 FAR (66,000 s.f. GFA) <i>As designed, see binding elements below</i>
Dwelling Units Per Acres (59-C-8.42.(b)):	150 d.u./ac.max. (130 d.u.'s)	36 d.u./ac. (31 d.u.'s)* max.
OPEN SPACE		
Public Use Space (59-C-8.43(a)):	10% NLA min. (2,674 s.f.)	10% min. (2,674 s.f.) min.
Active & Passive Recreation (59-C-8.43(b)):	20% NLA min. (5,348 s.f.)	20% min. (5,348 s.f.) min.
Total Open Space:	30% NLA min. (8,022 s.f.)	30% min. (8,022 s.f.) min.

* Number, type and location of MPDU's to be determined at Site Plan based on the number of market units proposed/ approved and in accordance with applicable regulations. The minimum percent of units to be MPDU's is 12.5% if the number of units approved requires MPDU's.

PARKING TABULATION (59-E-3.7)

12 one b.r. multifamily d.u.'s @ 1.25 spaces per d.u. =	15 spaces
15 two b.r. multifamily d.u.'s @ 1.50 spaces per d.u. =	23 spaces
4 three b.r. multifamily d.u.'s @ 2.00 spaces per d.u. =	8 spaces
31 total multifamily d.u.'s	46 total spaces required (49 off-street spaces provided)*

* Based on maximum number of dwelling units. Number of parking spaces may be reduced if fewer units are approved/constructed. Bicycle parking will also be provided. Type and location to be determined at Site Plan.

TRAFFIC STATEMENT

31 proposed d.u.'s @ 0.5 peak hour (AM and PM) trips per d.u. =	14 trips
- Existing trips from 8,116 s.f. +/- office use + 1 SFD d.u.. =	13 trips
Net new peak-hour trips =	1 trip

DEVELOPMENT PROGRAM

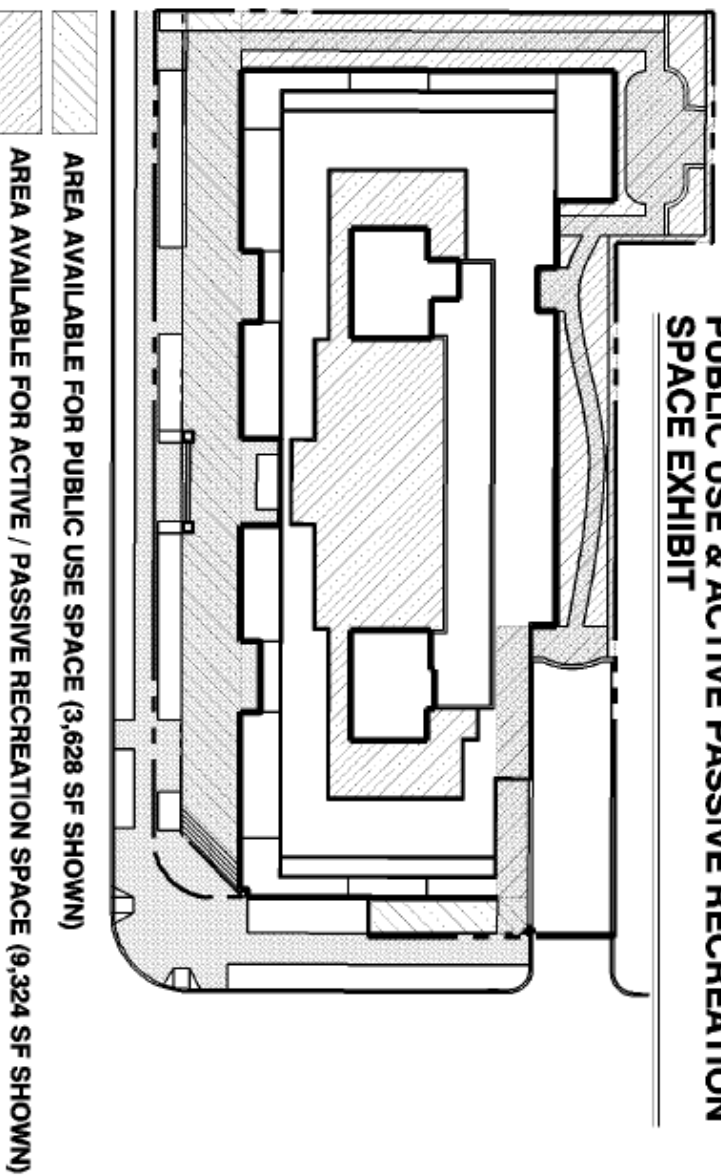
The project will be constructed in one phase. Development is not dependant on the county's capital improvements program.

GENERAL NOTES

General Notes and Public Use & Active Passive Recreation Space Exhibit, from Ex. 95(a)

- Existing zones are TS-R (Transit Station - Residential by G-779) and R-60 (Residential, one-family).
- Boundary info. from deeds and plats of record. Topography from field survey by G&O in Nov., 2006. Surrounding property info. from MNCPPC GIS
- There are no historic buildings or structures located on the subject property.
- Ten-year Plan Water and Sewer Categories: W-1 and S-1 respectively.
- The site is within Bethesda Central Business District Sector Plan area of the Bethesda/Chevy Chase and Vicinity planning area.
- The site is within the Bethesda CBD Transportation Policy Area.
- The site is within the Little Falls Watershed (Class I).
- Servicing utility companies are WSSC (water/sewer), PEPCO (electric), Verizon (telephone), Washington Gas (natural gas) and Comcast (cable).
- The limit of disturbance encompasses the entire site and no existing structures are to remain.
- This plan is not for construction. The locations of existing underground utilities are shown in their approximate locations per available utility company records. The exact location of all underground utilities should be verified by "Miss Utility" (1-800-257-7777) prior to any excavation.
- Greenhorne & O'Mara, Inc. does not express or imply a guarantee or warranty as to the location or existence of any underground utility.

PUBLIC USE & ACTIVE PASSIVE RECREATION SPACE EXHIBIT



E. Sector Plan

The subject property is located within the area covered by the *Bethesda CBD Sector Plan, Approved and Adopted July 1994* ("Sector Plan"). It is not, however, within the Bethesda CBD, but is in the area designated in the Master Plan as the TS-R District. See Sector Plan Figure 3.1, at p. 38. The Sector Plan's basic vision for the TS-R District is set forth below (Sector Plan at 5):

The Plan recommends creation of a high-density, low-rise 'urban village' that steps down in height from 6 floors along Woodmont Avenue to 3 floors along Arlington Road, and provides from 45 to up to about 100 dwelling units per acre. The Plan retains and revises the TS-R (Transit Station-Residential) Zone to achieve this vision.

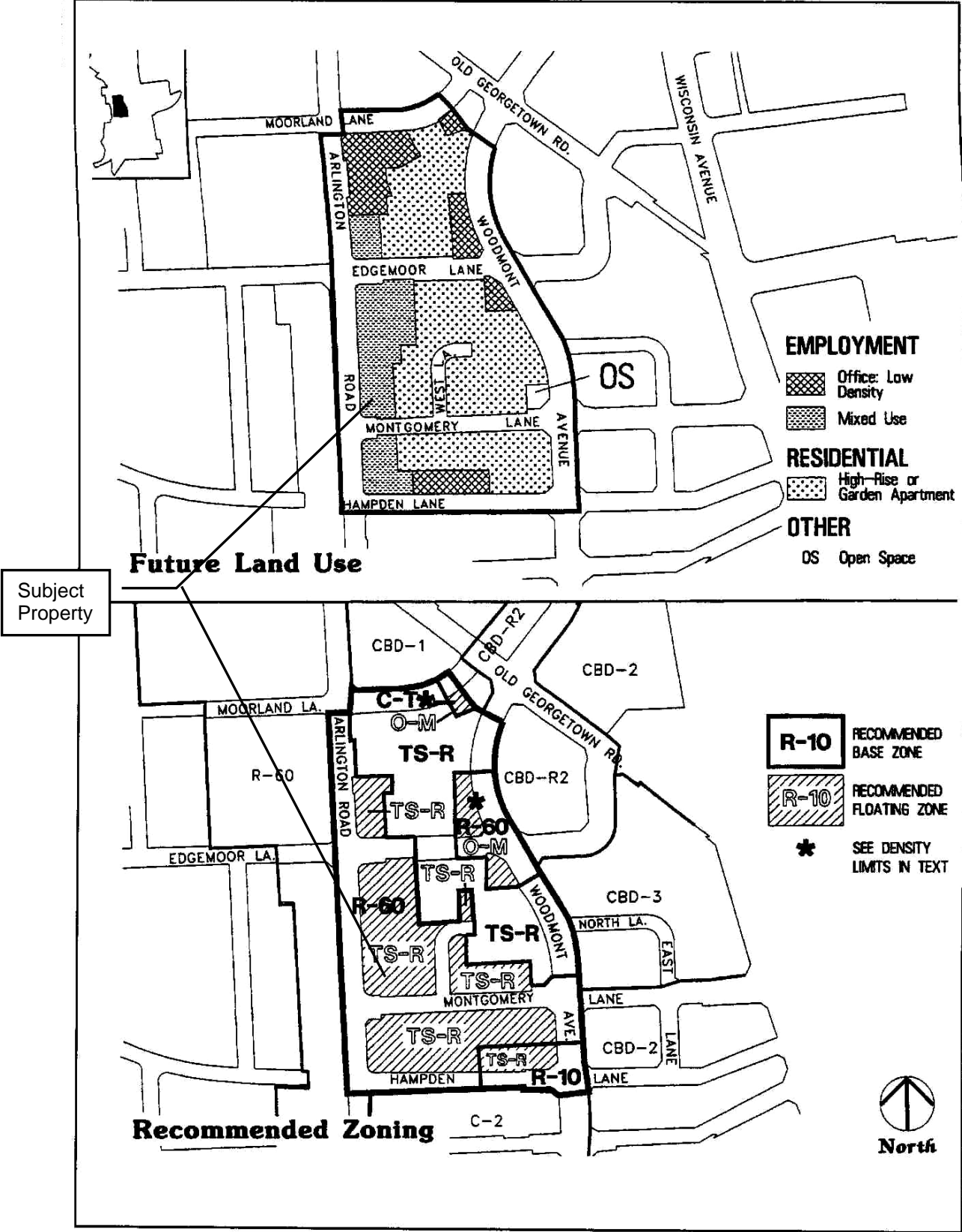
The urban village concept was described in detail, with written objectives, extensive written recommendations, urban design guidelines and several maps and drawings. The objectives were as follows (Sector Plan at 80):

1. Provide incentives for and remove barriers to achieving high-density housing in the TS-R District.
2. Increase flexibility in the TS-R Zone to allow the district to achieve a low-rise, high-density "urban village" pattern.
3. Retain residential scale along Arlington Road.

The Sector Plan identified recommended zoning and land uses in the drawing on the next page, Figure 4.13. The subject property was recommended to retain its existing R-60 zoning as the base zoning, with TS-R as a recommended floating zone. It was recommended, like most of the Arlington Road frontage in the TS-R District, for mixed use. The text explains that commercial uses should be limited to the ground floor, or possibly above ground floor if restricted to 20 percent of the total floor area and commercial uses do not share common pedestrian access with residential. See Sector Plan at 80. The plan also recommended that special exception uses in single-family houses be permitted to continue.

TRANSIT STATION RESIDENTIAL DISTRICT

FIGURE 4.13



Technical Staff did not address the apparent divergence between the present proposal for a residential building and the Sector Plan's recommendation for mixed use. Mr. Sekerak testified that he views the TS-R Zone as primarily residential, with only limited commercial uses recommended in the Sector Plan. Accordingly, he believes the elimination of the office component in the original development plan for this site is appropriate, and is acceptable to the Planning Board and its Staff. The Hearing Examiner is inclined to agree that residential use substantially complies with the Sector Plan's recommendations for this site. One of the three general objectives for the district was to achieve high-density housing, and none of the objectives includes promoting non-residential uses. Moreover, the text sharply limited the extent of non-residential uses that the plan considered appropriate. Thus, the Hearing Examiner concludes that residential uses were the focus of the TS-R District and the "mixed use" recommendation was intended to accommodate special exceptions and limited other commercial uses where desired, but not to require them. This conclusion is supported by the existing pattern of development: aside from the subject property and the Funt property, all of the properties along Arlington Road that are recommended for mixed use in Figure 4.13 -- VOB, The Edgemoor at Arlington and the Hampden Lane property -- have been constructed with or approved for residential-only developments.

The Sector Plan recommended the TS-R Zone to provide more flexibility in site development. It encouraged a "low-rise, high-density 'urban village' form of development," consisting of three- to six-story apartment buildings with the appearance of townhouses, unit entrances on the street, parking underground or in the rear, and internal, private open space. See Sector Plan at 82-84. The Sector Plan proposed a minimum density of 45 dwelling units per acre throughout the TS-R District except along Arlington Road, where no minimum density was recommended "to allow townhouse development at lower densities." Sector Plan at 82. The maximum density recommended was up to 2.5 FAR or 100 dwelling units per acre. See *id.*

Technical Staff found that the proposed development would be in substantial compliance with the recommendations of the Sector Plan, but did not specifically discuss the density recommendations. Mr. Sekerak stated that although the Sector Plan's recommendation for densities

below 45 dwelling units per acre along Arlington Road was described as permitting townhouse development, in his view, the Sector Plan does not dictate that all new development on that road has to be townhouses. He argued that the maximum of 36 dwelling units per acre proposed on the subject site would help balance nearby high-rise density. He would not consider 45 dwelling units per acre practical on the subject property, within the constraints of the recommended height limit and setbacks – it would require very small units. The Hearing Examiner finds that the Sector Plan recommended no minimum density along Arlington Road, which is consistent not only with townhouses but with the notion of stepping down both height and density from the CBD core to the edges of the Sector Plan area. Thus, even if the Applicants seek site plan approval for only 19 units, as some evidence suggests, the resulting density of approximately 22 units per acre would not conflict with any Sector Plan provision.

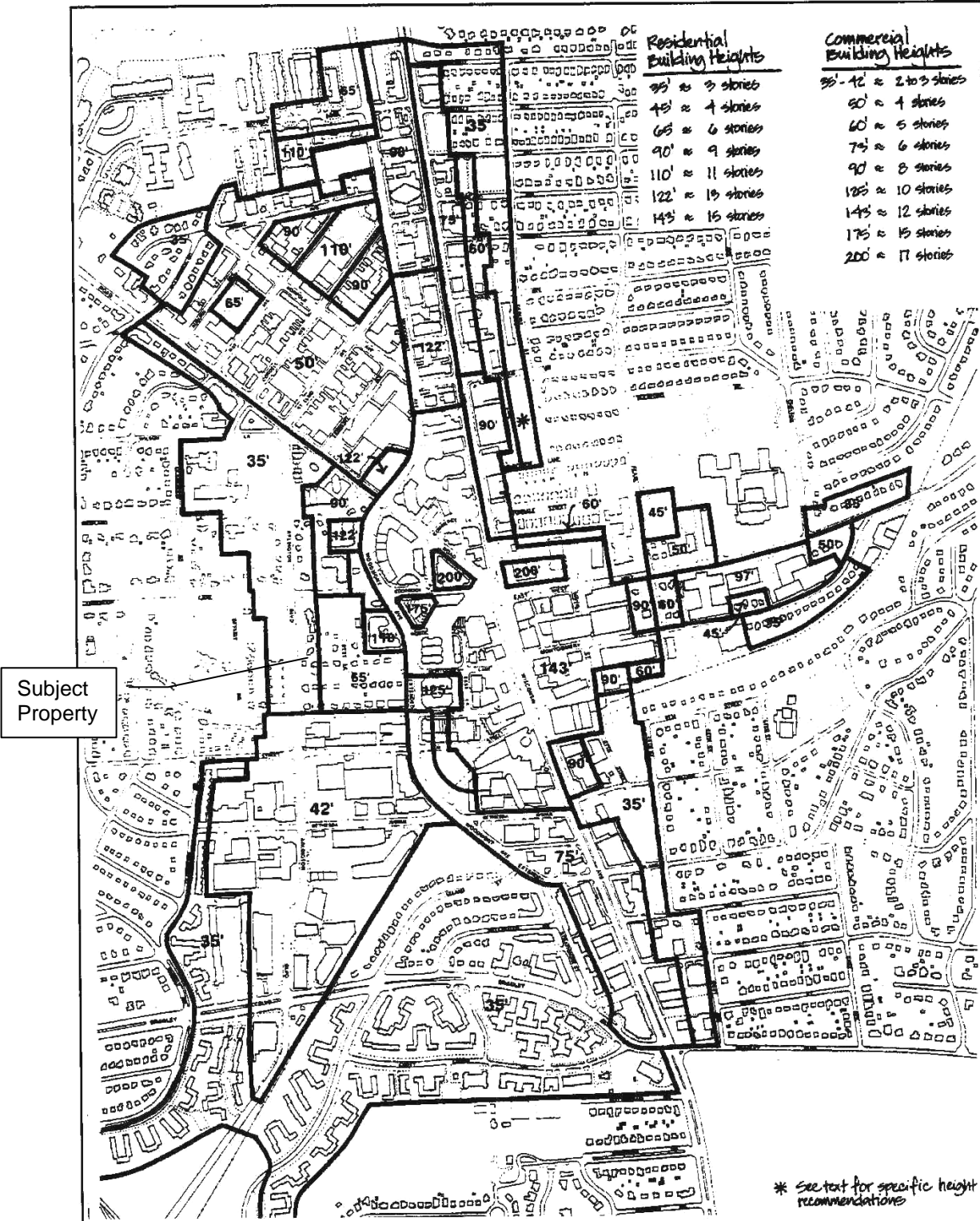
The map on the next page, Figure 3.2 from page 39 of the Sector Plan, divided the planning area into smaller areas with recommended height limits. The subject property is located in an area recommended for a maximum height of 35 feet, which corresponds to three stories for a residential building. Figure 3.2 refers the reader to the text for specific height recommendations. The text calls for building heights to step down from the Bethesda Metro Center properties to achieve desirable and compatible transitions to adjacent areas. See Sector Plan at 40. More specifically, it recommends building heights in the TS-R District “urban village” of six stories along Woodmont Avenue, stepping down to three stories along Arlington Road. See *id.* at 5. Technical Staff found that the building proposed here, with a maximum height of 35 feet along Arlington Road for the first ten feet of the building façade, stepping up to a maximum of 48 feet in height, would be consistent with the Sector Plan. This finding was based primarily on the fact that the existing development plan for three of the lots comprising the subject site, approved in 2001 in connection with LMA G-779, permitted the same height limitations: 35 feet for the first ten feet off of Arlington Road, rising to 48 feet for the fourth story. See Sector Plan at 10, 17. Staff concluded that in G-779 (and in G-778, which rezoned the site of The Edgemoor at Arlington, across Montgomery Lane), “the height of the building was established as a result of the architectural style and the need to adjust the height of the

structure to the transitioning elevation of Arlington Road which rises to the north.” Staff Report at 10.

In the present case, Staff finds that the proposal conforms to the Sector Plan, and supports the overall design and the landscaped rooftop terrace for use by residents. See *id.*

BUILDING HEIGHT LIMITS

FIGURE 3.2



Mr. Sekerak opined that the proposed building would satisfy the Sector Plan's height recommendations by providing a graduated increase in height from the nearest single-family home 300 feet to the west to the six-story building approved on the Holladay property, adjacent to the subject site to the east, and to the high-rise apartment buildings closer to Woodmont Avenue. See Ex. 26(a) at 11. Mr. Sekerak cited other Sector Plan recommendations that he feels the proposed building would satisfy:

- Page 40, which recommends stepping down building heights from Metro Center, treating rooftops as sculptural elements and usable outdoor space, and achieving compatibility with nearby residential areas through techniques such as stepped down heights, articulated building walls and other architectural means to minimize building bulk and shadow impacts.

- Descriptions of the TS-R district on pages 80 and 81, which describe the preferred high-rise, low density urban village form of development and recommend retaining a residential scale along Arlington Road. Mr. Sekerak opined that the proposed building would be residential in scale and character.

- Reference on page 82 to rooftop recreation areas.
- Recommendation on page 85 to avoid leaving isolated parcels. Mr. Sekerak argued that the present application would promote this goal by bringing into the existing development plan a parcel that would otherwise become an isolated, R-60 lot between TS-R developments.

- Additional urban design guidelines on page 85, which call for "low-rise building heights which step down to three floors along Arlington Road" and up to six floors near Woodmont Avenue. These guidelines also call for 15-foot setbacks from the Sector Plan right-of-way for Arlington Road, locating residential entrances on the street to encourage street life, and locating parking underground or in rear decks, so as not to be seen from surrounding streets.

Community members pointed out that the urban design guidelines on page 85 also recommend designing roof tops "to achieve a residential image by using hip roofs, gables, turrets, and other types of pitched roof lines," because a "varied roof line is desirable to improved character and

reduce the sense of bulk.” Mr. Sekerak pointed out that this recommendation is inconsistent with the statement on page 82 that rooftop recreation areas may be provided in the TS-R District. The Hearing Examiner notes that the general design guidelines for the Sector Plan, on page 40, display a dual desire for rooftops: to treat them as “sculptural elements” that contribute to the visual interest of the skyline, and to consider them as usable outdoor space where appropriate. Thus, it appears that a variety of roof choices could be consistent with the Sector Plan, including a flat roof with terraces for residential use.

The Montgomery County Civic Federation, represented by Jim Humphrey, argued that where the Sector Plan recommends a three-story, 35-foot building height, with buildings that look like townhouses and pitched roofs to help maintain a residential appearance, the present proposal for a 48-foot building with a flat roof fails to satisfy the Sector Plan. Mr. Humphrey maintained that the 35-foot maximum height recommendation should be applied to the entire building, regardless of what was approved in G-779 or other nearby zoning cases.

Applying the Sector Plan requires interpreting its terms. The Sector Plan recommends stepping down building heights from the Metro Center area towards Arlington Road, as a transition to the single-family Edgemoor community. The building proposed here would be consistent with this recommendation, as it would be lower in height than the Holladay building and the nearby high-rises, and even slightly lower than the City Homes townhouses, which are about 50 feet in height. The Sector Plan recommends a maximum building height along Arlington Road of 35 feet, but it also recommends “low-rise building heights which step down to three floors along Arlington Road” and reach up to six floors near Woodmont Avenue. See Sector Plan at 85. If the task presented were to interpret the Sector Plan as matter of first impression, the Hearing Examiner might be tempted to conclude that buildings fronting on Arlington Road should be no greater than 35 feet in height for their entire depth. As Mr. Humphrey pointed out, the height-district map on page 39 of the Sector Plan clearly extended the 35-foot height for the full depth of the parcels fronting on Arlington. See Ex. 107. Moreover, the fact that earlier approvals have sanctioned buildings in the form proposed here would not be reason enough to approve the present proposal, if doing so required a clearly erroneous

interpretation of the Sector Plan. There is, however, enough ambiguity in the language of the Sector Plan to permit the interpretation proposed here, i.e. that it is sufficient to have a 35-foot height only for the first ten feet off of Arlington Road. Moreover, that interpretation has been applied repeatedly by the District Council and the Planning Board along this stretch of Arlington Road, in G-778 (The Edgemoor at Arlington), G-779 (part of the subject site) and G-842 (the Hampden Lane property). In each of these cases, the District Council approved a building with a height of 35 feet along Arlington Road, stepping up within a short distance to a greater height and additional stories. The Planning Board and its Technical Staff have similarly found, repeatedly, that ten feet of 35-foot height is enough to constitute “stepping down” to 35 feet on Arlington Road.

The standard we have consistently applied in zoning cases, as specified in 59-D-1.61(a), is *substantial* compliance with the applicable master or sector plan. The proposed development would substantially comply with the use and density recommended in the Sector Plan, as noted above, and with applicable urban design guidelines. It would contribute to the “tenting” effect of building heights decreasing as they move away from the Metro core; it would in part step down to 35 feet along Arlington Road; it would avoid the isolation of a parcel that otherwise would remain an R-60 island between TS-R developments; it would have the recommended 15-foot setback from Arlington Road, with the building entrance on the street; it would have articulation with varied fenestrations; it would create usable outdoor roof-top space; and the parking would be underground. Based on all of the above considerations and relying on the preponderance of the evidence, the Hearing Examiner concludes that the proposed development would substantially comply with the recommendations of the Sector Plan.

F. Compatibility

No arguments have been made to suggest that the proposed building would be incompatible with The Edgemoor at Arlington to the south, or with the Holladay building that has been approved to the east. The former is the same height as proposed here, and would be buffered by the width of Montgomery Lane. The latter would have little physical separation from the proposed

building, since its developer chose to site the building just six feet off their joint property line, but it would enjoy the superior position of a significantly taller building. Some community members argued that the proposed building would be incompatible with the neighborhood generally, and with the Bethesda Library across the street, because it would change the current impression of openness and low-rise buildings. Mr. Sekerak argued persuasively, however, that the library building would be buffered from any adverse effects by the Arlington Road right-of-way, a four-lane road, and therefore there would be no adverse impact. Moreover, the preponderance of the evidence, including expert testimony and evidence describing the neighborhood, demonstrates that the proposed building would fit in well with the surrounding area. There was virtually no discussion of the compatibility of the use, which is very similar to uses throughout the surrounding area, and clearly compatible.

The significant compatibility question in this case involves VOB, to the north. VOB contains four rows of townhouses grouped around a central open space. One row of townhouses backs onto the subject property, and each of the four units has a small outdoor terrace that sits right on the property line. Owners of three of these units participated in the hearing and expressed great concern about the impact of the proposed building. They argued that the proposed building would be too close to their homes to preserve a reasonable sense of privacy, that its bulk and mass would be excessive, that it would plunge their terraces into shadow for even more of the day than they are already, and that the rooftop terraces would create noise problems. VOB residents argued that the fourth floor of the proposed building should be removed entirely, that the building should be set back 20 feet from the northern property line, rather than 15, and that the rooftop terraces should be farther away from the north side of the building.

In response to these arguments, the Applicants presented extensive expert testimony from their land planner and architect, both of whom opined that the proposed building would be compatible with its surroundings, including VOB. In Mr. Sekerak's view, a three-story building on the subject site would create a very clumsy transition to the three-story VOB buildings to the north, which sit on top of a nine-foot-tall parking garage platform, the four-story Edgemoor at Arlington building to the south, and particularly the six-story Holladay building that has been approved for the adjacent

property to the east. See Tr. July 2 at 53-54. Mr. Sekerak and Mr. Ponte noted that the VOB townhouses closest to the subject site are 35 feet in height as measured from the top of their garage, not as measured from the street. As a result of this, and because Arlington Road slopes down from north to south, the top floor of the proposed building would be roughly even with the peak of the VOB rooftops. Mr. Ponte explained that the first floor of the townhouses that back up to the subject site would be about even with the second floor of the new building. From the first floor, the townhouse's southern view would be the privacy fences bordering their terraces plus, looking up, the top half of the third floor of the proposed building and, farther back, the fourth floor. From the second and third floors, the VOB townhouses would have a view of the north wall of the proposed building, which, per the textual binding elements on the development plan, would have articulation and varied fenestration. Residents on the third and fourth floors of the proposed buildings would, in turn, have a view of the second and third floors of the townhouses. Mr. Ponte stated that residents would be able to look down into the VOB terraces from the third floor windows, but not from the fourth floor, since it would be stepped back five feet farther than the first three stories. North-facing windows on the ground floor of the proposed building would look at the unarticulated brick wall of the VOB garage. The north view from the second floor of the proposed building would be of the privacy fences.

The photograph below shows the VOB units backing onto the subject site, the brick wall on the property line and the privacy fences atop it. The small building immediately across the driveway is the single-family structure currently on the lot that is the subject of the present rezoning request. It sits approximately 15 feet from the property line, roughly where the proposed building would sit. The brick wall facing south in the middle distance is the south end of another row of VOB townhouses – the row that would abut the Holladay building. The shed and small building to the right of that brick wall are to be replaced by the Holladay building. The high-rise in the far distance is The Christopher.

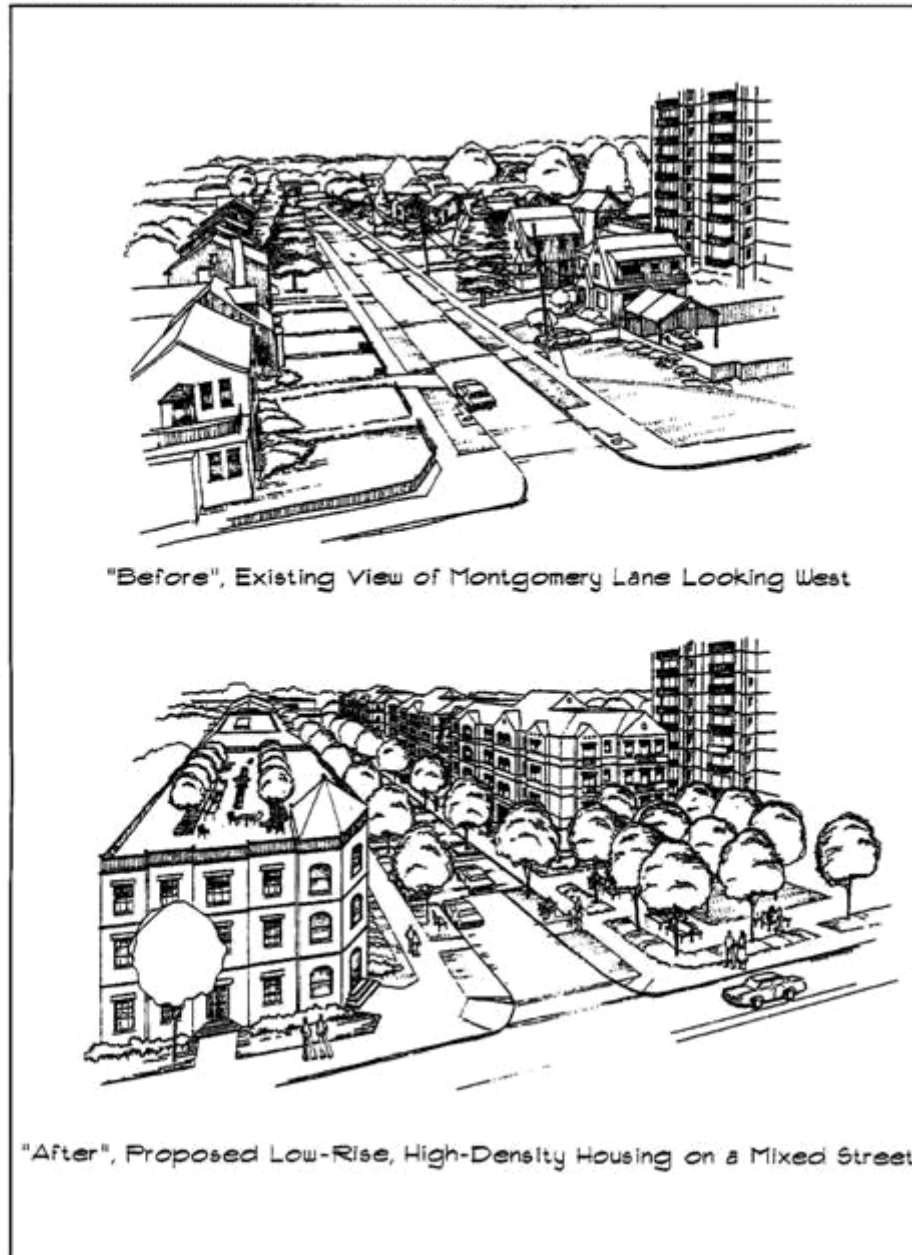
South End of VOB and Driveway on Subject Site, Ex. 71

With the specified 15-foot minimum setback from the north boundary, plus the setbacks of the VOB townhouses varying from 10 to 12 feet, the building-to-building setback between the proposed building and VOB would be between 25 and 27 feet. This would be greater than the building-to-building setback between VOB and the Holladay building, and greater, as Mr. Ponte pointed out, that the distance between single-family detached homes in some single-family zones.

The proposed building would reduce the sense of privacy that VOB residents currently enjoy, since they have the luxury of looking down on a building whose windows rise no higher than the VOB privacy fences. The Hearing Examiner is persuaded by the testimony of Mr. Sekerak and Mr. Ponte, however, that the relationship between VOB and the proposed building would be consistent with reasonable expectations of privacy in an urban environment, and with the Sector Plan's "urban village" concept. The Sector Plan's vision was of low-rise, high-density housing. This has been described as a contradictory concept, but the drawing that follows, taken from the Sector Plan, suggests that the concept mostly involved buildings that were not tall, but could provide high density housing by occupying most of the lot. Thus, the concept anticipated little or no setback between buildings.

TRANSIT STATION RESIDENTIAL DISTRICT: ILLUSTRATIVE

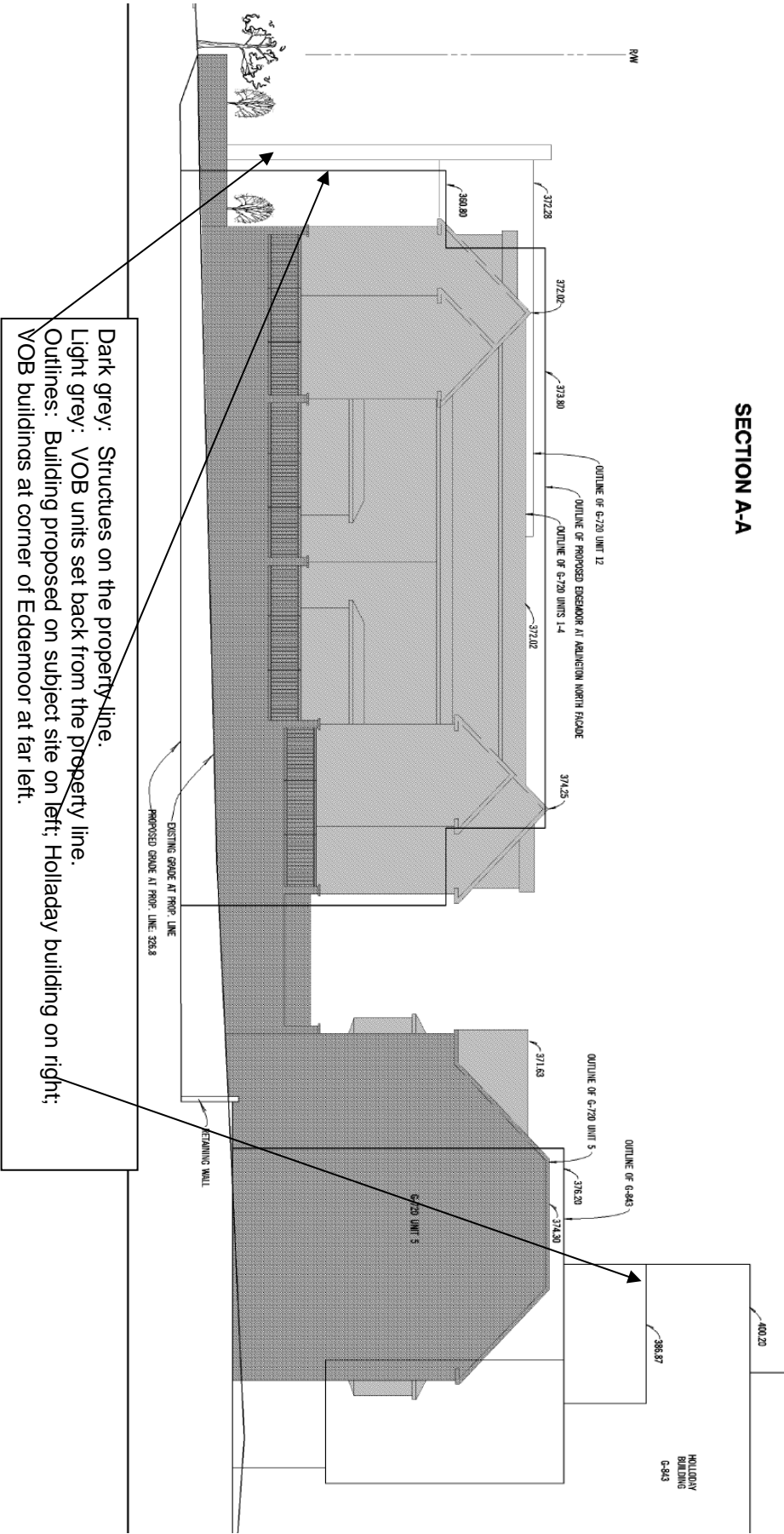
FIGURE 4.15



page
84

Mr. Sekerak prepared the exhibit shown on the next page to demonstrate graphically the relationship between the building proposed on the subject property, the building that has been approved for the Holladay property, and VOB. The drawing is a cross-section. It shows the screen fence, the garage wall and the townhouse wall at the rear of the site, all of which are on the property line, in dark grey. The VOB buildings that sit 10 to 12 feet back from the property line, abutting the subject site, are light grey. The building proposed on the subject site, the Holladay building and the VOB townhouses that are farther north, at the corner of Edgemoor Lane, are shown as outlines.

Massing Drawing, from Ex. 95(f)



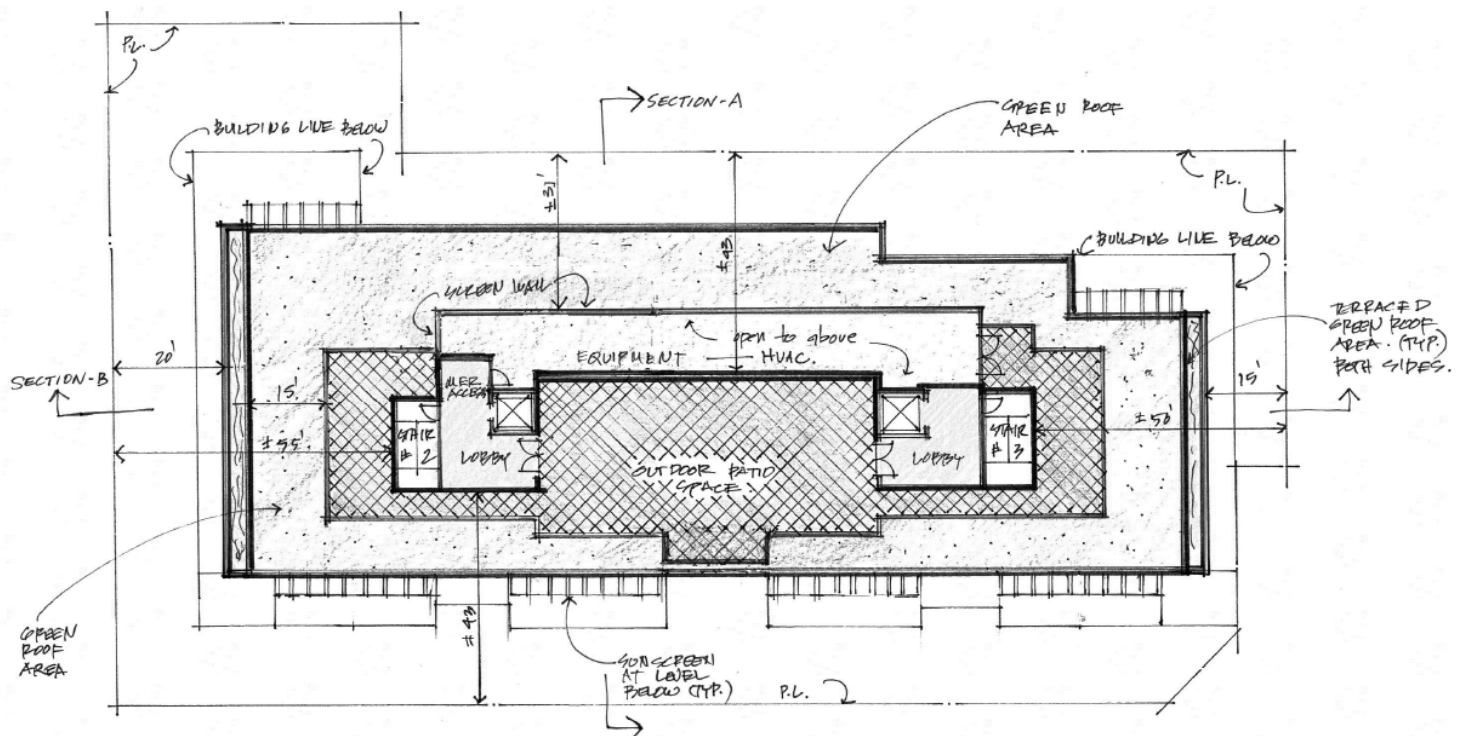
The massing drawing above shows that the proposed building would be slightly deeper than the nearest row of townhouses and slightly taller, making the confronting ends of the two buildings comparable in size. The proposed building would, of course, have a much longer façade along Arlington Road than a row of four townhouses, but this would not have the immediate impact on VOB residents of the building's north façade.

This drawing also addresses another concern voiced by VOB residents, which is the extent to which the proposed building would cut off the line of sight towards the street from the front of the nearest townhouses. Mr. Sekerak explained, as shown on the drawing, that the proposed building would sit closer to Arlington Road than the front wall of the closest townhouse, but farther from it than the row of VOB townhouses located at the corner of Arlington Road and Edgemoor Lane. Thus, the street view from the row of townhouses closest to the subject site is constrained more by other VOB units than it would be by the proposed building.

The Applicants presented an artist's rendering of how the proposed building would fit in with the other nearby buildings along Arlington Road. This drawing, reproduced in Appendix A to this report, suggests that the proposed building would be about the same height as the buildings on either side of it and similar in style to The Edgemoor at Arlington. The drawing also shows the Hampden Lane building, but it is difficult to say how accurate this depiction is, since the approved development plan does not provide a great deal of detail. In addition, the drawing shows outlines of the Holladay building and the Edgemoor Condominiums. For the building proposed on the subject site, the drawing depicts the Applicants' current plans, which are more detailed than the textual binding elements. The overall size and general location of the building would be fixed by the textual binding elements as shown on the drawing, but the architectural details would be determined at a later stage. The Hearing Examiner finds that the general size and scale depicted for the proposed building in Appendix A would be a positive addition to the Arlington Road streetscape, contributing to the low-rise, high-density urban village envisioned in the Sector Plan and to a sense of continuity among the buildings.

VOB residents' concern about noise from the rooftop terraces did not diminish when the Applicants increased the setback for the fourth floor and the roof by an additional five feet. They remain convinced that noise from rooftop socializing will be intrusive. As shown on the roof plan below, the main area of the rooftop terrace would be in the middle of the roof, about 85 feet from the northern property line. The closest portion of the rooftop terrace would be approximately 40 feet from the northern property line. As Mr. Ponte pointed out, this is considerably greater than the typical distance between backyard recreation areas for single-family homes in the R-60 Zone. He argued persuasively that townhouse dwellers in an urban setting cannot reasonably expect to have less noise intrusion from neighbors than residents of single-family homes. Both Mr. Sekerak and Mr. Ponte testified that noise disturbance is more likely run from VOB to the proposed building than the other way around, since VOB has outdoor terraces right on the property line. In the Hearing Examiner's view, VOB residents' concern about rooftop noise is out of proportion to the likely impact, particularly since they already live with the noise from one another's terraces and from Arlington Road.

Rooftop Plan, Ex. 95(b-8)



VOB residents are very concerned about the impact of shadows from the proposed building. The Applicants presented an animated shadow study that shows how shadows would move throughout the day, as well as still images showing shadow impacts at various times of day and various times of year. Some of these images have been reproduced in Appendix B to this report. The Hearing Examiner concludes from the shadow studies that at certain times of year and during certain times of day, the proposed building would add to the shadows falling across the closest VOB townhouses and their rear terraces. The evidence suggests that during the winter months, in particular, the proposed building would put the terraces in shade for much of the afternoon. As Mr. Sekerak explained, the VOB townhouses and their terraces experience shadows caused by other VOB units and the nearby high-rises, and will experience shadows from the Holladay building. Shadow impacts are a normal part of urban living, and avoiding any new shadows is not, in the Hearing Examiner's view, a reasonable expectation. Testimony indicates that the Applicants' decision to pull the fourth floor back an additional five feet reduced the shadow impacts. Even a three-story building on the subject site would add to the shadows that fall across VOB lots. If the rezoning is approved, the Planning Board, whose staff has the expertise to evaluate shadow impacts in detail, will have the authority to require further changes if it finds the shadow impacts too severe.

Community member Kathleen Fiskien presented a shadow study page that she said was given to her in connection with the rezoning application for the Holladay property. See Ex. 109. This page shows VOB almost entirely in shadow at 8:00 a.m. on November 21, with or without the Holladay building. The shadows appear to come from farther east, and Ms. Fiskien stated that they were described as shadows from the Edgemoor Condominium and The Chase. See Tr. July 2 at 218-20. Mr. Sekerak noted that this page represented a time of extreme shadows, shortly after dawn during the winter. He was not surprised to see a depiction of very long shadows at that hour at that time of year. Ms. Fiskien used this page to argue that her development already experiences a lot of shadows, and should not be subjected to more. In the Hearing Examiner's view, the more obvious point from this page is that additional shadows from the subject site would be unlikely to make a notable difference, given the shadows VOB already experiences.

Mr. Sekerak noted that the form of development recommended for the TS-R District in the Sector Plan would certainly involve buildings casting shadows on one another. He noted a brief mention in the Sector Plan that design elements should be used to minimize shadow impacts, not eliminate them. See Tr. July 2 at 19-20. In Mr. Sekerak's view, a 15-foot setback with an additional five-foot setback for the top floor accomplishes that goal much more than any of the other developments in the area have done. See *id.* at 20.

Based on the preponderance of the evidence, the Hearing Examiner concludes that the likely shadow impacts do not warrant a finding of incompatibility.

VOB residents focused on building height, proximity and shadow impacts. Another important element in a compatibility determination is density. The following table presents density information for existing and approved buildings along Arlington Road, starting at Moorland Lane and moving south to Hampden Lane.

**Arlington Road Densities from Moorland Lane to Hampden Lane
From Ex. 95(e) and Testimony**

BUILDING NAME AND/OR LOCATION	FAR	DWELLINGS PER UNIT
7511 Arlington Rd, corner of Moorland	0.42	N/A (office use)
The Christopher. ⁵ Highest density is not on Arlington Road.	2.48	108
Single-family home north of Funt property	None given	None given
Funt property, northeast corner of Edgemoor Lane. Densities given are for development that was approved but has not been built. Existing density is lower.	1.0	13
VOB, southeast corner of Edgemoor Lane.	1.53	26
Proposed building	2.0⁶	22 to 36
Edgemoor at Arlington, southeast corner of Montgomery Lane	1.9	27
Hampden Lane building (proposed but not yet built). Most of the building fronts on Hampden Lane, not on Arlington Road.	3.05	81

⁵ The high-rise portion of The Christopher is located on Woodmont Avenue. The portion of the development that actually fronts on Arlington Road consists of two single-family structures for which a separate density was not provided. Presumably that density is similar to the building next door to the north, which is also a single-family structure in office use.

⁶ The current design represented an FAR of 1.8, but the textual binding element allows up to 2.0.

The information available is incomplete, since it does not include a density for the single family home next to the Funt property, for the current use of the Funt property, or for the two single-family structures that are part of the development plan for The Christopher. Moreover, only a small part of the density shown for the Hampden Lane building would affect Arlington Road, and that is difficult to quantify. To make a meaningful comparison, the Hearing Examiner places less weight on the data provided for The Christopher and the Hampden Lane building, because their density is mostly not on Arlington Road, and for the Funt building, because the preponderance of the evidence indicates that the owner does not intend to implement the approved development plan. The range of densities remaining (shown in bold in the table) is from 0.42 to 1.9 FAR, and from 26 to 27 dwelling units per acre. The proposed building would have an FAR comparable to the top end of the range, and a dwelling unit density either somewhat below or somewhat above the range. These proposed densities would be consistent with the character of the area, and with the Sector Plan's expectation of lower densities along Arlington Road.

As outlined in the previous paragraphs, the record contains extensive evidence concerning the relationship of the proposed building with VOB, including distance, height, line of sight impacts, shadow impacts, overall fit in the neighborhood, noise and density. Having considered all the evidence introduced by the parties, the Hearing Examiner finds, for the reasons stated above and in the remainder of this section, that the preponderance of the evidence best supports a finding that the proposed building would be compatible with existing and planned development in the surrounding area.

Owners of the VOB units backing on to the subject understandably would prefer to have a greater distance between the two buildings. This, however, is not an entirely reasonable expectation in a development that chose to take advantage of the TS-R Zone's flexibility by building right up to its own property line. VOB residents might have expected that an adjoining property owner would make the same choice, building right up to its property line and leaving the townhouses with only their terraces as a buffer. The Applicants in this case did not make that choice, in all likelihood as much for the sake of their own future residents as for VOB's benefit. They chose, instead, a

setback that two experts have described as reasonable, and even generous, in an urban environment. VOB residents clearly would prefer to have a three-story building next door, with a height of 35 feet from the road grade all the way back, to reduce shadow impacts and allow VOB's third stories to look down on the proposed building, rather than the other way around. If VOB had been built at a height of 35 feet from the street grade, the argument to limit the subject building to the same height all the way back would have been much stronger, for compatibility reasons if not for Sector Plan compatibility. Based on the actual height of the VOB buildings above street grade, the proposed building is reasonably comparable in height. While its mass would be greater, the textual binding elements impose limitations that ensure a step-back on the fourth floor, windows on all sides, articulation and varied fenestrations, and VOB input on landscape design. These are important indicators of compatibility that will bind the present owner and any future owners, if the rezoning is approved.

The Hearing Examiner notes that based on the general size and scale shown in Appendix A, the building now proposed would achieve a greater degree of compatibility with the neighborhood as a whole, and would better promote the Sector Plan's objectives and recommendations, than the building that was approved in 2001. The original development plan would have left an isolated R-60 parcel, whereas the present proposal would promote a unified character of development. Distance and buffers are often necessary to protect a sensitive use from an incompatible building or use. Where the use and the building are compatible with their surroundings, additional protections are not needed. In this case, the textual binding elements on the Development Plan assure a form of development and type of use that will be a positive, compatible contribution to the neighborhood.

G. Public Facilities

Under the County's Adequate Public Facilities Ordinance (Code §50-35(k)), an assessment must be made as to whether the transportation infrastructure, schools, water and sewage facilities, and police, fire and health services will be adequate to support the proposed development, and whether the proposed development will adversely affect these public facilities. Both the Planning

Board and the Council have roles to play in this assessment process. The Planning Board reviews the adequacy of public facilities at subdivision, under parameters that the County Council sets in the Growth Policy.⁷ While the final test under the APFO is carried out at subdivision, the District Council must first make its own public facilities evaluation in a rezoning case, because the Council bears the responsibility to determine whether the reclassification would be compatible with the surrounding area and would serve the public interest.

1. Transportation

Under the 2003-05 AGP Policy Element, subdivision applications are subject to only one transportation test, Local Area Transportation Review ("LATR").⁸ The Planning Board recognizes its LATR Guidelines as the standard to be used by applicants in the preparation of reports to the Hearing Examiner for zoning cases. LATR Guidelines at 1. LATR involves a traffic study intended to evaluate whether a proposed development would result in unacceptable congestion at nearby intersections during the morning and evening peak hours. In the present case, the Applicants prepared only a transportation statement, not a fully study, because the proposed development would generate fewer than 30 new peak hour trips. The impact of a development with fewer than 30 peak hour trips is considered too small to measure. See LATR Guidelines at 5. The Applicants' traffic consultant, Craig Hedberg, estimated that the proposed development would generate a maximum of 14 peak hour trips. Net of the trips generated by existing uses on the site, Mr. Hedberg estimated that the proposed development would result in an increase of one trip in each of the morning and afternoon peak hours. As a result of the small number of new trips, under the Growth Policy test that will apply if the development proceeds to subdivision, the traffic increase will not require compliance with any mitigation requirements that normally apply in Bethesda. Moreover, Mr. Hedberg opined that

⁷ See 2003-05 Annual Growth Policy – Policy Element, Resolution No. 15-375, adopted October 28, 2003. The Hearing Examiner hereby takes official notice of the 2003-05 AGP Policy Element, which was in effect when the present application was filed and therefore, pursuant to Section 59-H-2.4, is the Growth Policy to be applied to this application at zoning.

⁸ See 2003-05 AGP Policy Element at 6-7; *Local Area Transportation Review Guidelines Approved and Adopted July 2004* ("LATR Guidelines") at 1. The Hearing Examiner hereby takes official notice of the LATR Guidelines.

the increase in trips would have a very, very minor impact on nearby intersections. All of Mr. Hedberg's trip generation estimates were based on trip generation rates published by MNCPPC for office and residential uses in Bethesda. Technical Staff agreed with Mr. Hedberg's conclusions. See Staff Report at 21-22.

Mr. Hedberg opined that consolidating the five existing driveways into one would have an operational benefit along Arlington Road. He acknowledged that creating a single driveway on Montgomery Lane would result in more vehicles passing through the intersection of Montgomery Lane and Arlington Road. In his view, however, given the overall level of trip generation, the impact would be very minor. See Tr. March 7 at 76. Mr. Hedberg noted that based on traffic counts that he obtained from MNCPPC records, the critical lane volume ("CLV") at the intersection of Arlington Road and Montgomery Lane as of March, 2007 was 656 during the morning peak hour and 405 during the afternoon peak hour. These numbers are well below the Bethesda congestion standard, which is a CLV of 1,800. At Arlington Road and Edgemoor Lane, a count from March 2007 indicated a CLV of 832 during the morning peak hour and 596 during the afternoon peak hour.

Analyzing the proposed driveway location on Montgomery Lane, Mr. Hedberg noted that the road is straight and there are no visual obstructions to block a driver's line of sight. He opined that the proposed driveway location would be safe, adequate and efficient, noting that the driveway is shown at the eastern edge of the property line, providing the maximum distance from Arlington Road.

3. Utilities

Testimony from the Applicant's land planner indicates that all necessary utilities, including public water and sewer, are readily available to the subject site and would be adequate for the proposed development. Technical Staff confirms that the subject property is served by public water and sewer, and that the proposed development would have no impact on these systems. See Staff Report at 21.

4. Schools

The subject property is located in the Bethesda Elementary School, Westland Middle School and Bethesda Chevy-Chase High School attendance areas. See letter dated October 25, 2007 from Bruce Crispell, Montgomery County Public Schools (“Crispell letter”), attached to Staff Report. Based on average yield factors developed by MNCPPC, Montgomery County Public Schools (“MCPS”) expects the proposed development to generate approximately two elementary school students, one middle school student and one high school student. See Crispell letter. According to MCPS capacity calculations, enrollment exceeds capacity at the Bethesda Elementary School and is projected to exceed capacity in the future. See *id.* Enrollment at the local middle school exceeded capacity at the time of the Crispell letter, but an addition was scheduled to open in August 2008. Enrollment at the local high school currently exceeds capacity, but an addition is scheduled to open in August 2009.

The Planning Board is required under the Growth Policy to determine, for each fiscal year, whether each school cluster has adequate capacity under the Growth Policy test to permit approval of additional subdivisions. The results of the Planning Board’s school capacity evaluation for Fiscal Year 2009 indicates that eight school clusters, including the Bethesda-Chevy Chase cluster, exceed 105 percent of program capacity at the elementary level.⁹ As a result, any subdivisions approved during FY2009 in the Bethesda-Chevy Chase cluster will be required to make a school facilities payment. The record does not indicate whether the Bethesda-Chevy Chase cluster would pass the applicable test under the Growth Policy in effect when these applications were filed, because the Planning Board no longer applies that test. Case law permits the District Council to deny a rezoning based on school overcrowding, on the theory that if a cup is full, even one more drop can cause it to overflow. See *Malmar Associates v. Board of County Commissioners for Prince George’s County*, 260 Md. 292, 307, 272 A.2d 6 (1971). However, in light of the very small number of students

⁹ The Hearing Examiner hereby takes official notice of the Planning Board’s letter of July 8, 2008 to the Council President and the County Executive.

the proposed development is expected to generate, the Hearing Examiner does not consider denial to be justified on that basis.

H. Environment and Stormwater Management

The subject property contains no streams, wetlands, floodplains, steep slopes or highly erodible soils. It is exempt from submitting a forest conservation plan. A tree save plan is required as part of the exemption approval, although it is undisputed that no trees would be saved. One specimen tree on the property, a 40" White Mulberry, would unavoidably be removed for the proposed development. A small stand of trees located on the eastern property line would also be negatively affected by the development. Mr. Sekerak testified that in his view, the trees would have to be removed for Holladay building, because the underground garage would go virtually to the property line. The Staff Report did not specify whether the Holladay building alone would kill the trees, but noted that between the two developments, nearly 100 percent of the critical root zones of the trees would be removed because of the underground garages. See Staff Report at 23. Staff acknowledges that trees are especially valuable in developed areas with a great deal of imperviousness, but does not believe it is possible to save any of the trees on the subject site. Instead, Staff suggests mitigation through planting.

Several neighbors express dismay at the prospect of losing the large trees that sit on the property line between the subject site and the Holladay property. The trees are a welcome bit of green in an urban landscape. Both of these properties, however, are recommended in the Sector Plan for development that would make it difficult to preserve the trees. Moreover, having already approved one development that arguably will be enough to kill the trees, fairness suggests that the District Council should not deny or remand the present applications to save the trees.

The Applicants have received conditional approval from the Department of Permitting Services for a concept stormwater management plan that provides for an underground filter to improve the quality of stormwater run-off before it flows into the storm sewer system. See Ex. 69. Channel protection measures (formerly known as quantity control) were waived because the one-year

post-development peak discharge increase is estimated to be less than or equal to two cubic feet per second. See *id*; testimony of Afsi Nikoo.

I. Community Participation

Most of the concerns voiced by community witnesses pertain to compatibility and Sector Plan compliance, and have been discussed in Parts E and F above. Their testimony is summarized in Part IV below. The record contains correspondence from all of the community members who testified at the hearing, most of whom wrote two or three letters, some to Technical Staff and some to the Hearing Examiner. See Exs. 27, 30(c), 37(a), 44, 45, 54(b), 59, 64, 86.

VOB resident and Land Use Chair Bernie Fisker made three contentions that will be discussed here. He argued that the textual binding elements should include three commitments that were made during the rezoning of the neighboring Holladay property: a minimum 20-foot building setback from the VOB property line, a row of evergreen trees between the two buildings for screening, and a provision that before construction begins, the applicant will enter into a pre-construction agreement with VOB addressing possible damage to the VOB property or buildings that might result from construction activities.¹⁰ The Applicants in this case declined to make any of these three commitments, on the advice of their land planner and counsel. The Applicants pointed out that while the VOB townhouse row that abuts the Holladay property sits right on the property line, the row of townhouses that abut the subject site are set back between 10 and 12 feet from the property line. Thus, the 20-foot setback on the Holladay property is a building-to-building setback. On the subject property, the proposed 15-foot setback would create a building-to-building setback of 25 to 27 feet. VOB residents note that the townhouses abutting the Holladay property face west, so that only the side of the end unit faces the property line, not the private terraces of the units. The Applicants point out, in response, that the Holladay building will still be visible from the private terraces facing east, and will be only 20 feet from the closest one.

¹⁰ Some of Mr. Fisker's requests echo those made in two letters in the file, which call for a construction agreement and a landscaping agreement acceptable to VOB as textual binding elements. See Exs. 34(c), 35.

Mr. Sekerak advised strongly against any commitment at the zoning stage to a particular landscaping treatment. He argued that landscaping should be determined during site plan review, with input from Technical Staff and VOB. He also opined that he considers a row of tall evergreens to be a poor choice in the narrow space between two buildings. In his view, it would be much better to avoid fragmenting that valuable space with a third vertical element between the two walls. He suggests alternative landscaping treatments such as a pathway between the building with low plantings, and perhaps creeping plants climbing the walls and cascading down from the roof. In accordance with this advice, the textual binding elements provide for consultation with VOB on landscaping, but do not commit to a particular type of landscaping, nor do they give VOB approval authority. The Hearing Examiner does not consider a commitment to a particular type of landscaping necessary to a compatibility finding in this case.

With regard to a pre-construction agreement, Mr. Fisker stressed that in the Holladay case, the Applicant agreed to a textual binding element stating definitively that it would enter into a construction agreement with VOB before construction begins. In the present case, the Applicant is willing to specify only that it will use good faith efforts to enter into a construction agreement with VOB before beginning construction of the building. Applicants' counsel argued that his clients should not be in a position where the building has been approved, but it cannot be built because of difficulties in negotiating a construction agreement with VOB. That, he declared, would give VOB an unacceptable level of control over whether the project proceeds. The Applicants emphasized that a construction agreement would be normal and expected in any situation where existing buildings are so close to a proposed construction site, so he has a strong interest in successfully negotiating such an agreement. Moreover, Mr. Fisker and the Applicants are in agreement as to what issues a future construction agreement should address. Nonetheless, Mr. Fisker remains unsatisfied with the lack of certainty. The Hearing Examiner finds the textual binding element shown on the Development Plan acceptable.

The record also contains letters from 12 other community members voicing concerns about the proposed development. See Exs. 29(c), 34(c), 35, 36(c), 38(a), 43(a), 50, 52, 53, 65, 84, 85. These 12 individuals include residents of VOB, the Edgemoor Condominium, Hampden Square

(on Woodmont Avenue) and The Christopher. All of the letters cite the sense of open space and moderately-sized buildings as part of the charm of this part of Bethesda. Several express the view that the large trees on the property line between the subject site and the Holladay property should be preserved as a neighborhood amenity. Others voice concern that many developments have been permitted in Bethesda that are larger than the Sector Plan recommended, with a resulting decrease in quality of life for residents. Many of the letters were written early in the tenure of this case, before the Applicants stepped the fourth floor back an additional five feet from the north and south side, and before they removed from the plans a fifth, partial story, consisting of a party room on the roof. Thus, these writers were reacting to a taller and slightly bulkier building than the one that is currently proposed.

A letter from the presidents of the Council of Unit Owners of the Edgemoor Condominium argues that the District Council and the Planning Board should address more carefully the construction schedule for the many developments that have been and are being approved in downtown Bethesda, to protect residents from the combined impact of multiple projects occurring simultaneously.¹¹ See Ex. 43(a). The writer also suggests that while individual small projects may have minor impacts on schools and traffic, more attention should be paid to their cumulative impact.

IV. SUMMARY OF HEARING

A. Applicant's Case in Chief

1. John Sekerak, Tr. March 7 at 12 – 67, 125-232; Tr. July 2 at 4-79.

Mr. Sekerak was designated an expert in land planning and landscape architecture. He first described the location of the property about 1,000 feet from the Bethesda Metro Station, the four lots of which it is comprised, and the current improvements, uses and points of access. Mr. Sekerak noted that the subject site currently has five driveways, three on Arlington Road and two on

¹¹ The letter also argues that the Sector Plan's height guidelines should be respected, apparently without regard to the irony of this comment, coming from a resident of a building that was permitted to exceed its Sector Plan height recommendation by roughly 50 percent.

Montgomery Lane. These would be replaced, under the proposed plan, with a single driveway on Montgomery Lane. Mr. Sekerak suggested that this would simplify traffic along Arlington Road.

Mr. Sekerak described buildings in the surrounding area, noting building heights where available. He described in some detail the relationship of the subject site to the VOB Townhouses, which are adjacent to the north. He noted that VOB Townhouses were built on top of a parking garage, like many buildings in the area and as proposed in the present case. The brick wall of the VOB parking garage forms the boundary between the two properties. It starts as a low wall near Arlington Road, and rises to a height of about nine feet along the first string of townhouses. At the top of the wall is a metal fence with privacy slats, which encloses the outdoor terraces of the townhouse units at that end of the building. The townhouse units themselves sit between 10 and 12 feet north of the property line. The four units in that string together create a building that is approximately 84 feet deep along the subject property. This Mr. Sekerak compared to the depth proposed for the building in this case, which is approximately 95 feet. Thus, he concluded that the proposed building compares favorably to VOB in terms of height, bulk, massing and visual impact. See Tr. July 2 at 48-49.

Mr. Sekerak proposed a definition of the surrounding area for purposes of this application, and provided a detailed description of existing and proposed land uses.

Having been the landscape planner and landscape architect for LMA application G-779, Mr. Sekerak described the elements that the Council approved in that case: a multi-family building set back approximately 15 feet from the Arlington Road right-of-way, with a height of 33 feet from the plaza level along its Arlington Road façade, rising to 47 feet from the plaza level ten feet back from the face of the building; the building constructed on a platform above underground parking; a single access point on Montgomery Lane; and the open area between the building and the road right-of-way considered open space. Mr. Sekerak described the present proposal as very consistent with what was approved in G-779 in terms of setbacks, building height, parking, entrance location and active/passive recreation area/public use space. He noted that the proposed building would be set back 15 feet from its eastern property line, which is farther than the six-foot setback approved for the building that is proposed on the adjoining Holladay property, and would contribute to a combined

volume of open space with the open area between lots 4 and 5 of the VOB townhouses and a setback area on the adjoining Holladay property. See Tr. March 7 at 128-29. The plaza level between the building and the public right-of-way would be proposed as public use space, with active/passive recreation areas inside, on the rooftop and at the rear of the building. The Development Plan commits the applicant to providing the statutory minimums for public use space and recreation area, but Mr. Sekerak pointed out that as currently envisioned, the plan provides for considerably more than the minimum. See Tr. March 7 at 144.

Community member Jim Humphrey, representing the Montgomery County Civic Federation, asked Mr. Sekerak's view of the likelihood that any member of the public would ever use the plaza area in front of the building, which is proposed as public use space. Mr. Sekerak stated that he does expect members of the public to use that space, and noted that although one would have to climb about nine steps to reach the plaza at the south end of the site, the plaza would be level with the sidewalk from about the middle of the site to the north end. He further noted that the official public use space for the VOB development is the front yards of the townhouses; Mr. Sekerak opined that the Applicant in this case would have the opportunity to create a superior arrangement for public use space on the subject site.

Turning to vertical dimensions, Mr. Sekerak observed that Arlington Road falls in elevation from north to south, as evidenced by the depiction on the Development Plan of stairs down from the plaza in front of the building at the south end, and the lower elevation of the plaza at the north end. For a pedestrian walking down Arlington Road, the proposed building's underground garage would not be visible at the north end of the site. Walking farther south, a pedestrian would start to see part of the garage emerging from the ground.

Mr. Sekerak described an artist's rendering of this stretch of Arlington Road with the proposed building. See Ex. 78. As a result of the grade change, the Edgemoor at Arlington sits a little lower than the proposed building would, and the VOB townhouses sit a little higher. The higher elevation of the VOB buildings would, in Mr. Sekerak's view, provide for air and light, which is a valuable element in an urban context. Despite repeated requests by VOB residents that the Applicant

commit to planting tall evergreens in the space between the proposed building and VOB's property line, Mr. Sekerak opined that such plantings would just fill up and fragment that valuable volume of space. He would prefer to create a pedestrian way with plantings, a pathway and lighting. He argued that the commitment to tall evergreens along the property line on the Holladay property, made in response to a request from VOB, was ill-advised. He noted that additional plantings would be possible on the roof, perhaps cascading down the side of the building, which would be more visible from the taller VOB buildings than ground-level plantings and would not compromise the volume of space between the buildings. See Tr. March 7 at 145. Mr. Sekerak stressed that an appropriate approach should be worked out during site plan review, with input from Technical Staff and the community.

In response to a question from Mr. Fiskien, Mr. Sekerak stated that widening the proposed building's setback from the VOB property line from 15 feet to 20 feet would not increase the options for landscaping. It would still be a very narrow space with high walls on each side, sharply limiting the type of plants that would be able to grow. See Tr. March 7 at 197-98.

Addressing differences between the development plan that was approved for part of the subject site in G-779 and the present proposal, Mr. Sekerak noted that the earlier plan involved office use on the ground level, fewer dwelling units than currently proposed, and no rooftop use.

Mr. Sekerak testified that the Applicant's intent with regard to Arlington Road streetscape is to install elements very similar to those used at VOB, which are a combination of Sector Plan recommendations, Bethesda streetscape guidelines from MNCPPC and discussions with the Departments of Transportation and Public Works (now called the Department of Transportation). These elements include a tree panel and brick sidewalks within the public right-of-way, plus additional elements on the subject site.

Mr. Sekerak described the type of garage entrance proposed for the subject site as very common in the neighborhood, noting that the entrance would be directly across the street from the same type of entrance for The Edgemoor at Arlington. With regard to sight line for exiting drivers, he noted that the ramp will reach grade level as a car approaches the right-of-way line, so there will

be no need for a retaining wall at that point. The right-of-way would have a tree panel and sidewalk, with the retaining wall starting on the subject property side of the right-of-way line and increasing in height as vehicles descend into the garage.

Mr. Sekerak noted that the proposal for 31 units corresponds to a density of 36 dwelling units per acre, far below the maximum for the zone of 150 d.u./acre. In terms of FAR, the present plans propose an FAR of 1.8, but the Applicants committed to 2.0 as a textual binding element, leaving some extra room in case of unexpected developments at a later stage, such as a new interpretation of what elements constitute gross floor area. See Tr. July 2 at 30-32. At the Hearing Examiner's request, Mr. Sekerak prepared an exhibit comparing the proposed density to the range of densities in existing and proposed buildings in the surrounding area. See Ex. 95(a). He explained that the broad range of densities reflects the variety of building types. The project with the highest density has frontage on Arlington Road, but the bulk of the density is in a high-rise, The Christopher, which fronts on Woodmont Avenue. The Arlington Road frontage has two smaller, single-family structures on parcels that cannot be redeveloped at higher densities without an amendment to the development plan approved for The Christopher. Similarly, he agreed that the recently approved Hampden Lane building has an FAR of 3.05, considerably higher than proposed here, but only a small portion of the building fronts on Arlington Road. Most of the density would be farther back on Hampden Lane. See Tr. July 2 at 28-29. Reviewing the densities of buildings that front on Arlington Road (and including the Holladay property for context), Mr. Sekerak concluded that the proposed building would be compatible with the existing mix of densities. See Tr. July 2 at 30.

In response to questioning by Mr. Humphrey, Mr. Sekerak conceded that for the property at the corner of Arlington Road and Moorland Lane, his comparison used the density that the District Council approved in the development plan in connection with the rezoning, although it has been a few years since the rezoning was finalized and the development plan has not been implemented. Mr. Sekerak was not aware that the owner of the property still has his dentist practice on the first floor, and has renovated the second and third floors and now uses them as his residence. See Tr. July 2 at 67-68.

Turning to the Sector Plan, Mr. Sekerak highlighted sections that he considers most applicable and opined, as discussed in Part III E, that the proposed development would substantially comply with the Plan.

Mr. Sekerak acknowledged that the Sector Plan recommends limiting building height to three stories along Arlington Road, stepping up to greater heights farther back. He argued that the proposed building would satisfy this recommendation because its Arlington Road façade would have three stories and a 35-foot height limit. He acknowledged that the building would step up to four stories just ten feet back from the façade, but he maintained that this would be consistent with the Sector Plan, which did not specify how far back from Arlington Road the three-story height should extend. To support his view, he noted that Technical Staff and the Planning Board agreed with him, and that the District Council had approved similar buildings nearby: The Edgemoor at Arlington, right across Edgemoor Lane from the subject site, which has a three-story façade and steps up to four stories ten feet back from the façade; the Edgemoor Crest planned on the Funt property, at the corner of Arlington Road and Moorland Lane, with a façade that technically would qualify as three stories, but would have the appearance of four stories due to an English basement (this development has not been built); and the Hampden Lane building, which will have a three-story height limit for its Arlington Road façade, stepping up to seven stories farther back on Hampden Lane. Mr. Sekerak stated that the development plan approved in that case does not clearly delineate a setback from Arlington Road, or how far back the 35-foot height will extend before the building height increases. Based on available information, he believes that the building will be set back only eight feet from Arlington Road, not the 15 feet recommended in the Sector Plan. In addition, Mr. Sekerak concludes from the submitted plans that due to the slope of Arlington Road, the building will have an additional story partly above-ground, giving it the appearance of four stories on Arlington Road. See Tr. July 2 at 55, 70. Mr. Ponte concurred with this conclusion. He added that the Hampden Lane building would be as close to Arlington Road as the closest set of VOB townhouses, and that its second-story setback would be the same distance from Arlington Road as the fourth-story setback for the proposed building. See Tr. July 2 at 148-49.

Under questioning by Mr. Humphrey, Mr. Sekerak conceded that in the Funt Property case, where he was the land planner, the Applicant described the building as a three-story structure, relying on measuring the height of the building from the grade of a terrace that was proposed at a level above the street grade – the terrace allowed the English basement level to be considered a cellar, rather than a basement, so that it would not be considered a story. See Tr. July 2 at 71-73. Mr. Sekerak defended the inconsistency of describing that approved-but-not-built structure as a four-story building in this case by stating that in the context of determining compatibility, the visual impact is more important than whether a building technically has three stories or four. In effect, he conceded that the building was described as three stories for purposes of obtaining approval, but it in fact would have the appearance of four stories.

Mr. Sekerak noted that the implementation of the Sector Plan's height recommendations in the TS-R District has been inconsistent. The Sector Plan recommends a six-story height limit within the TS-R District along Woodmont Road, but the Edgemoor Condominium building, at the corner of Edgemoor and Woodmont, was approved at a height of 100 feet. Directly across Edgemoor Lane, another multi-family building was approved at a height slightly exceeding the Sector Plan recommendation, in LMA No. G-819. A Federal Realty project farther south on Arlington Road was approved, after extensive litigation, at a height of 65-feet where the Sector Plan recommended a maximum of 42 feet. Under questioning by Mr. Humphrey, Mr. Sekerak conceded that the Federal Realty building is not in the TS-R District, and that he does not remember provisions of the relevant zoning text amendment well enough to know whether Mr. Humphrey is correct in asserting that the same legislation that permitted that building prohibited any building over three stories within 100 yards of any single-family home – effectively prohibiting anything over three stories in the next block of Arlington Road to the north, between Elm Street and Hampden Lane. See Tr. July 2 at 74-75. Mr. Sekerak considers the examples he cited to be both part of the physical context for the present application and indications of the Council's past interpretations of the Sector Plan. See Tr. July 2 at 63.

Mr. Sekerak then addressed the provisions of the TS-R Zone, starting with the intent. He noted that the subject property is within 1,500 feet of a Metro station, is designated in the Sector Plan as part of a transit station development area and is in a location where multi-family residential uses already exist. Mr. Sekerak testified that the proposed development would satisfy all of the development standards for the TS-R Zone, and would satisfy the purpose clause by promoting the effective use of transit station development areas, avoiding leaving isolated parcels, using the existing road system and improving existing streetscape and pedestrian conditions by removing driveways on Arlington Road. Mr. Sekerak opined that the proposed development would further comply with the purpose clause by creating additional residential uses where residents can walk to transit along attractive and inviting pedestrian ways, adding to the diverse mix of housing densities in the area, and serving as a transition to the institutional uses across Arlington Road that buffer the neighboring single-family community.

Turning to the purpose of the TS-R Zone to prevent detrimental effects on adjacent properties, Mr. Sekerak opined that the proposed development would have no detrimental impact on the library across the street, given that it would not create traffic or pedestrian safety problems, would improve sidewalks to make the library more accessible, and would be separated from the library by a four-lane road. Mr. Sekerak opined that the proposed development would have no detrimental impact on the VOB townhouses to the north, given the 15-foot building setback – which he described as generous in an urban context – and the lower elevation of the proposed building. He noted that VOB residents using the outdoor terraces that face the subject site, which are at the first-floor level for the townhouses, would face the second floor of units in the proposed building. Residents on the first floor of the proposed building, correspondingly, would face the unbroken brick wall of the VOB garage. Mr. Sekerak opined that the proposed building would have no detrimental impact on the Holladay building to the east, given that it would be significantly lower (four stories rather than six) and would be built at a lower elevation.

Mr. Sekerak opined that the proposed development would satisfy the requirement of the zone to conform substantially to the facilities and amenities recommended by the Sector Plan.

The Applicant has agreed to provide a small dedication at the intersection of Montgomery Lane and Arlington Road, to provide desired right-of-way; will provide a safe means of access, improving vehicular and pedestrian conditions with fewer driveway openings; will provide open space as required in the zone; and will make streetscape improvements. He noted that the proposed parking would satisfy Zoning Ordinance requirements. He further opined that the proposed development would satisfy the findings required for approval of a development plan under Code Section 59-D-1.61. His previous testimony addressed the substance of most of these findings. He added, with regard to the reference in subsection (d) to preserving trees and minimizing grading, that in this urban context, there are virtually no natural features to preserve. He described this location as one where the intense development is desirable “to allow those other areas of the County that do have [natural features] to remain preserved.” Tr. March 7 at 187.

With regard to public facilities, Mr. Sekerak stated that water, sewer and other utilities are in place and would be sufficient, and that the relevant school cluster has capacity at all age levels per the county Growth Policy.

Finally, Mr. Sekerak stressed that in this view, the previous approvals of G-778 and G-779 were based on sound consideration of the TS-R Zone and the Sector Plan, and the present applications should be approved for the same reasons. See Tr. March 7 at 190. He considers the proposed building to be compatible with surrounding development, based on the relationships among existing and proposed buildings. Mr. Sekerak acknowledged that with a maximum height of 48 feet, the roof line of the proposed building would be taller than the VOB townhouses. See Tr. July 2 at 46. He agreed with Technical Staff, however, that because of the grade difference and the elevation of the VOB buildings, there would not be a noticeable height difference between the two. See Tr. March 7 at 193, July 2 at 46. He acknowledged that mechanical equipment and staircases would rise above the roof, but described these as not visually noticeable because they would be set back from the edges. The Holladay building, in contrast, would be two floors taller than the building proposed on the subject site, and considerably taller than VOB.

The Applicant presented a shadow study to show, in the context of existing and approved development in the immediate area, the shadows the proposed building is expected to cast on other nearby buildings. The shadow study was particularly directed at impacts on the VOB buildings, some of whose residents expressed great concern about their terraces, which face the subject property, being plunged into shade. The shadow study was submitted in its entirety in electronic form, providing an animated view of how the shadows change during the course of a day and at different times of year. It was also submitted on paper for various times of the year, both in planimetric form (as seen from straight overhead), providing a horizontal appreciation of the shadows, and in isometric form (seen from overhead at an angle), which shows how the shadows relate to vertical planes that they intersect. In each of these forms, the study shows shadows in four contexts: shadow impact on VOB buildings from other VOB buildings; shadow impacts from the VOB buildings and the Holladay building approved to the east; shadow impacts from VOB buildings and the proposed building; and shadow impacts with all three – the VOB buildings, the proposed building and the Holladay building as approved at site plan. See Tr. July 2 at 9-10.

Mr. Sekerak noted that within the VOB complex, various townhouse units cast shadows on the outdoor living spaces of other units at various times. He described this as a characteristic of urban living. Looking at shadow impacts from the Holladay building, Mr. Sekerak noted that as approved, the Holladay building will cast shadows well onto both the subject property and VOB by mid-morning during the spring. Mr. Sekerak focused most of his attention on the exhibits showing the combined impacts of VOB, the Holladay building and the building proposed here. He described the shadows from the Holladay building as the dominant feature in the winter, making other shadows redundant.

In response to a question from Mr. Fiskin, Mr. Sekerak acknowledged that removing the fourth story from the proposed building entirely would result in reduced shadow impacts during certain times of year and at certain times of day. See *id.* at 64. He considers the shadow impacts to be a minor consideration in assessing compatibility. He described shadow impacts as one of many elements to consider, including height, bulk, mass, proximity, color, glare and articulation.

2. Craig Hedberg, traffic consultant. Tr. March 7 at 68-95.

Mr. Hedberg was designated an expert in transportation planning. He described the road network in the vicinity of the subject property, consisting of Arlington Road, a four-lane arterial roadway with an 80-foot right-of-way; Montgomery lane, which allows two-way traffic from Arlington Road to West Lane, but permits only westbound traffic between West Lane and Woodmont Avenue, so there is no continuous eastbound connection between Arlington Road and Woodmont Avenue; and full east-west movement on Hampden Lane and Edgemoor Lane. Mr. Hedberg noted that the corner of Arlington Road and Woodmont Avenue is signalized. The corner of Arlington Road and Edgemoor Lane has only pedestrian signalization, meaning that there is a button pedestrians can press which turns a signal light hanging over the intersection to red in both directions on Arlington Road. Mr. Hedberg acknowledged, in response to questions from the community, that this pedestrian signal does not always get drivers' attention. He suggested that other measures could be used, such as installing a textured sidewalk to act as a rumble strip.

Mr. Hedberg described the transportation statement he prepared for the present application, and opined that consolidating the five existing driveways into one would have an operational benefit along Arlington Road.

Mr. Fiskien asked Mr. Hedberg whether a real impact study has ever been done to assess the cumulative impact of multiple small development projects on Arlington Road. Mr. Hedberg noted that each applicant that prepares a traffic study is required to include traffic from other approved developments in its analysis, including small projects that are not required to have their own traffic studies. Thus, the cumulative effect of small projects is taken into account in analyzing larger projects. As an example of how large a project has to be to require a traffic study, Mr. Hedberg noted that a multi-family building with 66 or more units would require a traffic study.

Community member David O'Bryon asked whether any outcome studies have been done to assess the accuracy of the trip generation figures, i.e. to see whether a 65-unit multi-family building actually generates the amount of traffic that was expected. Mr. Hedberg responded by explaining that the trip generation rates are developed based on driveway counts from various types

of uses, taking into account the number of square feet for retail uses and the number of units for residential uses. He observed that the Bethesda trip generation rates are lower than MNCPPC's rates for the County as a whole, where there are more cars around. He noted that they are also lower than corresponding rates published by the Institute of Transportation Engineers, a nationally-known body. Based on Mr. Hedberg's best recollection, the multi-family trip generation rate for Bethesda is 0.45 trips per unit, compared to 0.48 trips elsewhere in the County. For a 30-unit building, the higher rate used outside Bethesda would not change the outcome – 13 trips in the morning and 14 in the afternoon. See Tr. March 7 at 87.

Community member Jim Humphrey asked Mr. Hedberg whether a queuing analysis has been done for the intersection of Arlington Road with Edgemoor Lane or Woodmont Road. He replied that a queuing analysis is required only if CLV exceeds 1,800, and those intersections are well below that level. When asked about sight line for drivers leaving the underground garage through the proposed driveway, Mr. Hedberg acknowledged that he does not know the height of the building wall that would run along the edge of the driveway. He described the question of the height of that wall and how far out a car would have to extend before the driver could see as a site plan issue. He opined that the arrangement could be constructed safely, for instance with an apron area for drivers to use in entering and existing the garage. Mr. Hedberg described the type of garage entrance proposed as common in this area, noting that the access point will not be approved at site plan unless it is found to be safe and efficient.

Community member Kathleen Fiskien asked whether any traffic studies have been done taking into account the traffic volumes on Arlington Road on Friday afternoons, which she believes is the most congested time of the week. Mr. Hedberg explained that the traffic counts in MNCPPC files are from Tuesdays through Thursdays, which are specified in the LATR Guidelines as the most representative days.

3. Rui Ponte, architect. Tr. March 7 at 154-,159, 222-230; Tr. July 2 at 91-149.

Mr. Ponte was designated an expert in architecture. He is the designer for the subject application, responsible for building elevations, mass and volume. Mr. Ponte presented architectural

drawings that show the building at its design height, 46.5 feet, rather than the maximum height of 48 feet that has been listed as a binding element. He described changes that have been made to the design during the rezoning application process, which include reducing ceiling heights to lower the building, stepping back the top floor an extra five feet from the northern property line, and reducing the amount of glass at the northwestern corner in response to privacy concerns from VOB residents. The Applicant also added some green roof area and a planting area on the roof of the third floor where the fourth floor steps back five feet, and eliminated balconies on the north side of the building in favor of balconies on the Arlington Road side. He described a series of indentations planned along the building's Arlington Road façade to break up the mass of the building. The current designs also provide for a lighter shade of brick on the top story, to make it less visually noticeable. Mr. Ponte opined that the building as currently designed would have a residential appearance, with residential-scaled windows and a main entrance much like the entrance to a multi-family building. He also considers the proposed building very consistent with the residential appearance of other buildings on Arlington Road, noting in particular the building materials, windows, scale and size, and plantings.

Mr. Ponte estimated that measured from ground level, the VOB townhouse buildings are approximately 39 feet tall to the peak of the roof, and roughly 35 feet to the mean between the eaves and roof. See Tr. March 7 at 225-26. He stated that the proposed building, with a maximum height of 48 feet, nonetheless would be a few inches lower than the peak of the townhouse roofs due to the difference in grade going south on Arlington Road. See Tr. July 2 at 114, Ex. 78. Mr. Ponte acknowledged that in at least one exhibit, the proposed building looks taller than the VOB townhouses. See Ex. 81. He explained that this exhibit was prepared without showing the effect of the street grade, and without placing the VOB townhouses accurately on the platform created by their garage. See *id.* at 228.

Mr. Ponte contradicted Mr. Sekerak's testimony slightly by stating that the plaza in front of the proposed building would not be at grade at the northern end of the building, but rather would be two to three feet below grade at the northern end, at grade in the middle of the building, and above grade at the southern end. See Tr. July 2 at 111-112. The Hearing Examiner attributes this

inconsistency to Mr. Ponte's greater familiarity with the architectural details and the changes that were made between the two hearing dates, which included lowering the building by about two feet.

Mr. Ponte described the architectural features planned for the roof. See *id.* at 118. These include two terrace areas, one about 260 square feet in size and the other about 360 square feet that residents could walk around on. The edges of these terraces are shown at a distance of 45 feet from the northern (VOB) property line, 40 feet from the southern property line and about 30 feet from the eastern property line. Two stair towers come through to the roof and mechanical equipment is shown behind a sound baffled wall system that would provide both visual and noise buffering. The walls around the mechanical equipment would be about eight feet high, with no roof so that excess heat can dissipate upwards. The first five feet from the edges of the roof is shown with heavier plantings, providing about 1,000 square feet of buffer area.

Mr. Ponte noted that the VOB buildings have roof-top air conditioning condensers in the middle of each block of townhouses, surrounding by only a two-foot parapet wall. These units would be visible from the roof of the proposed building. See Tr. July 2 at 122.

Mr. Ponte opined that from an architectural perspective, the proposed building would be compatible with surrounding development, and in fact would be an enhancement. It would be fairly small for a multi-family building, but at this location and in this zone, he considers it a good scale and size. See Tr. July 2 at 124.

In response to questioning from Mr. Humphrey, Mr. Ponte stated that although the Development Plan states that architectural features and the locations of balconies and windows are illustrative, he and the Applicants have spent quite a bit of time consulting on what this building should look like and how the units should be laid out. As a result, the designs displayed on the exhibits in this case are not random, nor are they based on a market-driven exercise, because if that were the case it would be a different building. Mr. Ponte acknowledged that projects change and properties change hands, but based on his experience and the amount of time that has gone into this project, he doesn't think that will happen in this case.

Mr. Fisksen asked how noise from people using the terraces on the proposed building would be mitigated. Mr. Ponte replied by noting that in single-family R-60 neighborhoods, houses can be about 14 feet apart, and people in a backyard could be 20 feet away, so neighbors hear one another. He observed that the proposed rooftop terraces would be farther away than that, so the noise impact would be lesser. In Mr. Ponte's experience, the biggest source of noise complaints with multi-family buildings is not rooftop terraces but mechanical equipment. Thus, his designs propose noise-baffling walls to mitigate the noise. He pointed out, moreover, that the outdoor terraces for the VOB units backing onto the subject property extend all the way to the property line, with no noise abatement features to buffer future residents of the proposed building from noise occurring on those terraces.

In response to questions from the Fiskens about visual privacy, Mr. Ponte stated that residents on the third floor of the proposed building would be able to see into the VOB terraces. Those on the first and second floors would not because of the height differential and fencing on the VOB property line, and those on the fourth floor probably would not be able to because of the additional setback. See Tr. July 2 at 144-45. VOB residents would be able to see, above their fences, roughly the top half of the third story of the proposed building, and part of the fourth floor.

4. Afsi Nikoo, civil engineer. Tr. July 2 at 80-89.

Ms. Nikoo was designated an expert in civil engineering. Her responsibility in this case was to examine stormwater management. She noted that the subject site is currently covered mainly with buildings or impervious surfaces. Ms. Nikoo prepared a stormwater management concept plan that has been approved by DPS. The plan provides for an underground filtering device to provide quality control. No quantity control measures were required because of the small size of the property and the rate of water flow. The proposed project would increase the quantity of stormwater run-off by less two cubic feet per second, so under county regulations, no quantity control is required. Under the concept plan, stormwater run-off would go into a filter, and after the cleaning process would exit into the public storm drain system, where capacity is available in both abutting roads. Ms. Nikoo confirmed that the subject property has no flood plains, protective soils or rock outgrowth, nor is it

located in a special protection area. She opined that the proposed stormwater management plan would satisfy county standards under Chapter 19.

5. Randall Rothstein, Applicant. Tr. July 2 at 149-157.

Mr. Rothstein described the history of the present project. He grew up in the Edgemoor neighborhood and watched Bethesda grow up, holding a “very fond, warm spot in [his] heart” for Bethesda. He moved to Potomac as an adult, but had a vision one day that he would like to move back to Bethesda. When the opportunity came up to buy the property on the corner of Arlington Road and Edgemoor Lane that is part of the subject site, he did so and moved his business into that property. His plan is to build a beautiful building, once his children are grown in eight or nine years, where he and his wife will live. He is seeking the rezoning now because he thinks the right climate exists to get approval for his long-term dream, and then he’ll be ready to develop it when the time comes. Mr. Rothstein stressed that he has dealt with the neighborhood in good faith and will continue to do so. He has no intention to flip this property to a developer. This building is his dream, and he intends to make it happen.

Addressing Mr. Fisk’s concern about a construction agreement, Mr. Rothstein stated that such an agreement would be beneficial for him as well as for VOB, and it would be crazy not to have one, but on the chance that they can’t agree on a construction agreement, he does not want his ability to construct this building to be tied to it. He pointed out that the VOB townhouses have been towering over the small house next to them for nine years, with a beautiful, open view, and they’re lucky that the plan for this building is long term, because they get to keep that open view for several more years. After that, he plans to give them a view of a beautiful building. He understands that there will be shadows, but that is part of urban living.

Finally, Mr. Rothstein confirmed his intention to organize the building as a condominium, with the condominium board of directors holding the responsibility for perpetual maintenance of common areas.

B. Testimony by Community Members**1. David O'Bryon, Tr. March 7 at 95-99**

Mr. O'Bryon is president of the homeowner's association for the City Homes townhouses, located on Montgomery Lane between Arlington Road and Woodmont Avenue, diagonally across Montgomery Lane from the subject site. He stressed that a basic premise of development in downtown Bethesda for over 30 years has been the Sector Plan's "tent theory," which suggests that buildings should be highest on Wisconsin Avenue and get lower moving towards Arlington Road. Mr. O'Bryon noted that the City Homes buildings are 48 to 53 feet tall, which should be proportional to the penthouse on a proposed project, not the top of their roof. He considers the four-story height proposed in this case to be acceptable, finding that it is consistent with the "urban village" concept recommended in the Sector Plan.

Mr. O'Bryon is concerned about parking and traffic. He notes that no one does any outcome studies to see whether developments actually produce the amount of traffic that was anticipated, or whether the parking is sufficient. He thinks more attention should be paid to these issues.

2. Bernie Fiskén, Tr. March 7 at 109-120; Tr. July 2 at 174-204.

Mr. Fiskén and his wife, Kathleen Fiskén, are the owners of and reside in 7437 Arlington Road, one of the VOB units that backs onto the subject site. He also serves as Chair of the VOB Land Use Committee and spoke on its behalf. Mr. Fiskén stated four basic objections: compatibility, consistency with the Sector Plan, and lack of sufficient binding elements in the event that the property changes hands. He described the extensive, ongoing efforts by VOB residents to stay informed about development in their neighborhood and participate effectively in approval processes. Mr. Fiskén thanked Mr. Rothstein for making changes to the original plans for the proposed building, but noted that more substantive adjustments could be made on the north side.

In Mr. Fiskén's view, current residents of the surrounding neighborhood for the subject site made a commitment to the TS-R Zone based on the expectation that new developments would be compatible, would respect the tent theory, and would not adversely affect the light and air available to

existing neighbors. He argued that development proposals in the TS-R District should be held to a higher standard now that there are people living in the district, with meaningful shadow studies that reflect light impacts on adjacent buildings, and meaningful noise studies when the project proposes significant outdoor recreation space in close proximity to neighbors. Mr. Fiskien declared that the proposed building would block light and air for the nearest VOB buildings, would not be compatible with its immediate neighbors and would not satisfy the Sector Plan's urban design guidelines, which call for low-rise buildings with sloped roofs and the appearance of townhouses.

Mr. Fiskien argued that the District Council cannot find the proposed development to be in substantially compliance with the Sector Plan, which calls for no more than three stories along Arlington Road. He quoted from the Hearing Examiner's report in LMA G-842 (the Hampden Lane property), which recommended a remand based on findings that the building as proposed would not be compatible with its surroundings, suggesting that the same recommendation should be made here. Mr. Fiskien suggested that the Applicant should reduce the entire building from four stories to three, and should set the building back 20 feet from the VOB building line instead of the 15 currently proposed.

The Hearing Examiner notes two salient facts concerning the Hearing Examiner's recommendation in LMA G-842. First, the Hampden Lane proposal was for a much bigger building than is proposed here. The building will have three full floors plus a partially-above-ground first floor on its Arlington Road façade, and will be two full stories taller than the adjacent City Homes townhouses. Second, although the Hearing Examiner found that the building as proposed would not be compatible with its surroundings, the District Council rejected this finding and voted to approve the application.

Mr. Fiskien expressed concern that despite Mr. Rothstein's current intentions and expressions of good faith, many things can happen in eight years, and the property could end up changing hands. Because of that possibility, he considers the binding elements currently proposed to be inadequate, particularly with regard to a construction agreement and landscaping.

Finally, Mr. Fiskien asked that the Applicant be requested to prepare a “transition plan,” which he described as an interim document between the Development Plan and the eventual site plan, to give VOB residents some comfort about where the plans stand. The Hearing Examiner explained that the County’s extensive land use processes do not include any filing between zoning approval and site plan or preliminary plan application. The Hearing Examiner recommended that Mr. Fiskien contact Mr. Rothstein from time to time, which should be easy to do since his office is located on the subject site, to check in on his plans for the property.

Under questioning by Applicant’s counsel, Mr. Fiskien acknowledged that the Holladay building approved on the property directly east of the subject site would be set back 20 feet from the nearest VOB building, less than 25 to 27-foot setback VOB would have from the first three floors of the building proposed in this case, and the 30 to 32-foot setback VOB would have from the fourth floor.

3. Jim Humphrey, Montgomery County Civic Federation. Tr. July 2 at 158-173.

Mr. Humphrey participated on behalf of the Montgomery County Civic Federation, as Chair of its land use section. His written testimony is provided at Exhibit 107.

Mr. Humphrey urged the District Council to remand the present application to be redesigned. He argued that the present development plan does not comply with the purposes of the Zone or with the recommendations of the Sector Plan, and that it “could show a greater degree of compatibility” with the City Homes townhouses and more especially the VOB townhouses. He noted that the purposes of the TS-R Zone include “to stimulate the coordinated, harmonious and systematic development of the area within the zone” and to “prevent detrimental effects on the use of adjacent property.” Tr. July 2 at 159. As this Hearing Examiner has found in numerous cases, this language effectively makes compatibility a requirement of the zone. Mr. Humphrey argued that in addition, the fact that the TS-R Zone contains only limited development standards, not the additional parameters that are specified in Euclidean zones, the Sector Plan recommendations should be given particular deference. He maintained that the Sector Plan should be given the same deference as in the PD Zone, which specifies directly a central role for the master and sector plans. The Hearing Examiner

notes that the PD Zone requires a greater degree of deference to the Sector Plan than any other zone in the County because of specific language in several parts of the PD Zone. Those references are not present in other floating zones, such as the TS-R Zone.

Mr. Humphrey noted that the Sector Plan recommends retaining residential scale along Arlington Road in the TS-R District, and that the building type should be three to six-story multi-family buildings with the appearance of townhouses. Building height is recommended to be three stories along Arlington Road and six stories on Woodmont Avenue. He further notes that the Sector Plan's urban design guidelines recommend designing rooftops to achieve a residential image and reduce bulk by using pitched rooflines. Mr. Humphrey observed that the 35-foot height limit recommended in the Sector Plan for Arlington Road was based on the height limit in the R-60 Zone, which was the existing zoning for single-family homes that then existed along Arlington Road in the TS-R District.

Mr. Humphrey acknowledged the "Note to Readers" at the beginning of the Sector Plan, which states that sketches and site plans in the Sector Plan are merely illustrative. In his view, this does not include maps, such as the height-district map on page 39. He stressed that while the TS-R Zone places responsibility to fix the ultimate building height with the Planning Board, the District Council has the authority to establish parameters such as a maximum building height. In the Civic Federation's view, reducing the four-story, 48-foot height of the proposed building is critical to ensuring substantial compliance with the Sector Plan and achieving "a greater degree of compatibility with particularly the VOB townhouses to the north. . . ." Tr. July 2 at 163.

Mr. Humphrey argued that when the District Council approved a 47-foot height for the building that was proposed on part of the subject site in LMA application G-779, the impact on VOB was mitigated or eliminated by the intervening lot, 7425 Arlington Road, which is the subject of the rezoning request in the present case. Mr. Humphrey noted that this lot is currently occupied by a single-family structure housing a special exception, and therefore is in commercial use. Because it is too small to qualify for the TS-R Zone independently, it could be redeveloped only within the standards of the R-60 Zone if it were not consolidated with the rest of the subject site. That would limit building height to 30 feet. With that property included in the present application, VOB loses that

buffer. This gives the height and mass of the proposed building a new and greater significance. In the Civic Federation's view, the 35-foot height recommended in the Sector Plan should be applied to the entire building, not just the first ten feet off of Arlington Road. Mr. Humphrey pointed out that the VOB buildings are all three stories, consistent with the Sector Plan. He observed that the Hampden Lane building in LMA Case No. G-842 was different, because it included some properties that are in the part of the TS-R District recommended for a 65-foot height. Mr. Humphrey stressed, in his testimony and written submissions, that the Council's approval of four-story buildings on the subject site and the Edgemoor at Arlington site in 2001 should not be used to justify yet another project that violates the Sector Plan's standards.

The Civic Federation contends that where the Sector Plan recommends a three-story, 35-foot building height, with buildings that look like townhouses and pitched roofs to help maintain a residential appearance, the present proposal for a 48-foot building with a flat roof fails to satisfy the Sector Plan.

Mr. Humphrey offered a statement of the Civic Federation's position on master plans, which is quoted here in full:

Our county officials and legislators claim to value master planning to the extent that the law requires prospective property purchasers to be informed of the existence of a master plan for the area in which they are considering a purchase, and that they be given the opportunity to examine that plan. If the law is to have any force or meaning, then the master plan for various communities and counties must have a high degree of predictability and reliability, such that when a property is shown to have an established height limit or any other building standard, then that standard is enforced and not treated as a mere guideline or suggestion.

Tr. July 2 at 167.

Mr. Humphrey closed by recommending, on behalf of the Civic Federation, that the resent application be remanded for improvements to the project design.

Under cross-examination by Applicant's counsel, Mr. Humphrey conceded that several buildings have been approved in the TS-R District along Woodmont Avenue that exceed the 65-foot height recommended in the Sector Plan. He argued that multiple wrongs don't make a right. Just

because other projects have been approved in violation of the Sector Plan does not justify, in the Civic Federation's view, additional such approvals. Mr. Humphrey acknowledged that the height of the building approved on Hampden Lane in Case G-842 likely exceeds 35 feet on parts of the tract that are in the area recommended for a 35-foot height limit, and he considers this inappropriate.

4. Samantha Gumenick, Tr. July 2 at 204-212.

Ms. Gumenick has lived in downtown Bethesda since 1999. She currently lives in The Christopher, facing Woodmont Avenue, but she and her family have purchased one of the VOB units that backs onto the subject property, and they intend to move into that unit shortly. She also has her real estate office on Woodmont Avenue, so as she described it, her whole life takes place within a four-block area and she has a tremendous interest in the long-term growth of Bethesda. Ms. Gumenick is a partner in a firm that manages multi-family buildings and she considers herself pro-development. She looks forward to the construction of the building proposed on the subject site, but has some concerns. Her household includes two children, whose bedroom will be on the third floor of their townhouse once they move in. She is concerned about the children having sufficient privacy and safety and a night-time environment that is quiet enough to sleep in. She believes a three-story building would be more appropriate on the subject site, to avoid having windows directly opposite the third floors of the VOB units. She would also like to see a 20-foot setback for the proposed building in its entirety, and smaller windows on the north side to provide more privacy for VOB residents. Ms. Gumenick argued that for the sake of long-term growth, families with young children should not be dissuaded from living in Bethesda, so new development needs to take their needs into account. Finally, she shares the Fiskens' concern that the binding elements on the Development Plan be sufficient to establish the parameters of the proposed building in the event that the property changes hands.

Under questioning from Mr. Hutt, Ms. Gumenick explained that the reason her family is planning to move is because their current home faces another high-rise with windows, and she cannot count on the children keeping their window blinds or shades closed. She conceded that her VOB neighbors on both sides have outdoor terraces, and could use them in a way that generates noise.

She suggested that the VOB terraces are very small, and therefore likely to generate less noise than the rooftop terraces proposed on the subject site. She clarified that she doesn't think a rooftop terrace should be prohibited, but she would prefer that the one on the north be smaller, and screened in some way.

5. Kathleen Fiskén, Tr. July 2 at 213-223.

Ms. Fiskén has lived with her husband, Bernie Fiskén, in one of the VOB units backing onto the subject site for six and a half years. She described herself as a very active citizen of Bethesda and Montgomery County, making use of county facilities, running a business in downtown Bethesda and serving on several county boards and commissions. Ms. Fiskén has also worked as a Peace Corps volunteer, an advocate for migrant workers in southern California, and a community activist in Washington, D.C.

Ms. Fiskén stated that the Edgemoor at Arlington (across Edgemoor Avenue from the subject site) "slid through" the approval process, but it is not consistent with the Sector Plan's height recommendations, and its sidewalks are too narrow for a pedestrian and a person in a wheelchair to pass. She stated that much has changed in the neighborhood since that building was approved, including a new skyline, new streetscape, and new local business. All of these, Ms. Fiskén contended require thoughtful zoning decisions.

Ms. Fiskén voiced a particular concern that the shadow study in this case is inadequate because, unlike the study used in the Holladay case, G-843, it did not take into account the effect of The Chase and the Edgemoor Condominium, the two closest high-rise buildings. Ms. Fiskén presented a copy of one page from the shadow study in G-843, showing the dramatic effect on VOB of shadows from the two high-rises. She observed that VOB already is in shadow a great deal of the time, and pleaded for a change that would prevent the proposed building from taking away the areas of sunlight they have now. See Tr. July 2 at 216-17.

Ms. Fiskén is concerned about compatibility. She noted that while the Holladay building will be 20 feet from the nearest VOB building, that wall of the VOB building has no windows, and there are no terraces facing the Holladay property, so the impact is very different. She agreed

with her husband and Ms. Gumenick that the proposed building should be reduced to three stories and moved back 20 feet from the property line. She also stated, in a written submission, that the large trees on the property line between the subject site and the Holladay property should be saved, that the proposed building would be inconsistent with the Sector Plan, and that the outdoor terraces backing up onto the subject site would be completely overshadowed by the proposed building due to its height and proximity. See Ex. 54(b).

C. Applicant's Rebuttal

Mr. Sekerak reviewed the page that Ms. Fiskien submitted from the shadow study in G-843, and commented that it was taken shortly after sunrise in very late November, so he is not surprised that at that time of year and that time of day, there would be very long shadows falling across VOB. He does not consider this inconsistent with the shadow study that his firm prepared in the present case.

In response to Mr. Fiskien's comments about the landscaping commitments made in the VOB case, Mr. Sekerak noted that the evergreens they agreed to plant are a typical solution to screen incompatible elements. He stated that the proposed building is designed to consolidate open space with open spaces on the Holladay and VOB properties, and reiterated that he would not recommend fragmenting the volume of space between the proposed building and VOB with tall vertical elements, such as an intervening wall of evergreens.

Turning to the question of noise, Mr. Sekerak freely admitted that he is not a noise expert, but observed that in his experience, like Mr. Ponte's, noise is typically an issue not between adjoining residential units, but between high noise generators and low noise receptors. He added that he has heard many experts say that the best noise attenuation method is distance. Mr. Sekerak stated that the rooftop recreation space on the proposed building would be set back substantially from VOB, while VOB has outdoor recreation areas right on the property line. He argued that the mechanical equipment on the proposed building would be muffled by a noise baffling wall system and by distance, so VOB residents should not be concerned about noise.

Finally, Mr. Sekerak opined that a master plan should be reasonably relied upon, but should not be construed as a development standard. He characterized the present proposal as trying to find the “best balance” among the Sector Plan’s recommendations. He suggested that residents should be able to reasonably rely on the full context of a master plan, not to pick out any one element as something that rises to the level of a development standard and invalidates other recommendations in the plan. See Tr. July 2 at 230-31. He declined to agree with Mr. Humphrey’s suggestion that a resident should be able to rely on the Sector Plan’s height limit map, on page 39, to expect that buildings within the area recommended for a maximum height of 35 feet will not exceed that height.

Mr. Ponte testified, on rebuttal, that he has lived in the Edgemoor neighborhood and had his office in Bethesda since 1989. In his view, the changes in Bethesda have been positive. He observed that numerous case studies have been done about Bethesda’s development, and many, many groups from other areas have come to Bethesda to observe what great urban growth looks like. He described a general consensus among planners that Bethesda is a model to be copied. Mr. Ponte argued that although other witnesses suggested there have been many mistakes in the development of Bethesda, in his view the area has been much improved, and the proposed building would continue enhancing the neighborhood. He noted that in today’s economic climate the marketplace is a good judge, and units in The Edgemoor at Arlington continue to set records for sales, with ever-increasing prices during a period of stabilizing and decreasing real estate values. Mr. Ponte pointed out that the proposed building would meet the demand for single-level living, which many people prefer to townhouse living. He suggested that imposing a 35-foot height limit would be arbitrary.

V. ZONING ISSUES

Zoning involves two basic types of classifications: Euclidean zones and floating zones. The term “Euclidean” zoning arose from the seminal United States Supreme Court case upholding the land use authority of local governments, *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926). Euclidean zoning divides the territory of a local jurisdiction into zoning districts with set boundaries

and specific regulations governing aspects of land development such as permitted uses, lot sizes, setbacks, and building height.

A floating zone is a more flexible device that allows a legislative body to establish a district for a particular category of land use, with regulations specific to that use, without attaching that district to particular pieces of property. Individual property owners may seek to have property reclassified to a floating zone by demonstrating that the proposed location is appropriate for the zone, i.e., it satisfies the purpose and regulations of the zone, the development would be compatible with the surrounding area, and it would serve the public interest.

The TS-R Zone is among the floating zones that provide for design specifications as part of a development plan. An applicant is afforded considerable design flexibility if development standards for the zone are satisfied. In exchange for that flexibility, development under the TS-R Zone is permitted only in accordance with a development plan that is approved by the District Council when the property is reclassified to the TS-R Zone. See Code §59-D-1.11. If approved, the development plan will provide basic design parameters for the site, much as the Zoning Ordinance provides design specifications for more rigidly applied zones. Normally, a development plan is expected to contain sufficient precision to fix the land use, height, density and bulk of the proposed development, which are basic components of compatibility, and to provide design specifications that govern post-zoning reviews. In the TS-R Zone, building height is specifically reserved for determination during site plan review. A development plan may set maximum building heights, to give the Council enough information to assess compatibility, but final height determinations are made by the Planning Board. See Code §59-C-8.51.

In the present case, the District Council must decide two applications, one for rezoning, which requires a related development plan approval, and one to amend an existing development plan. Because the findings for approval of a new development plan are the same as those for approval of a development plan amendment, this report and recommendation addresses both sets of findings as one.

A. The Development Plan

Before approving a development plan, the District Council must make five specific findings set forth in Code § 59-D-1.61. These findings relate to consistency with the master plan and the requirements of the zone, compatibility with surrounding development, circulation and access, preservation of natural features, and perpetual maintenance of common areas. The required findings are set forth below in the order in which they appear in the Zoning Code, together with the Hearing Examiner's analysis.

- (a) ***That the zone applied for is in substantial compliance with the use and density indicated by the master plan or sector plan, and that it does not conflict with the general plan, the county capital improvements program or other applicable county plans and policies. However, to permit the construction of all MPDUs required under Chapter 25A, including any bonus density units, on-site, a development plan may exceed, in proportion to the MPDUs to be built on site, including any bonus density units, any applicable residential density or building height limit established in a master plan or sector plan if . . . [not relevant].***

As set forth in detail in Part III.E above, after a careful review of all of the evidence, the Hearing Examiner concludes that the proposed development would be in substantial compliance with the use and density indicated in the Sector Plan. The proposed development would not carry out all facets of the Sector Plan's recommendations, but it would be consistent with the Sector Plan's goals for the TS-R District and would fulfill many of its objectives and recommendations.

There is no evidence to suggest that the proposed development would be inconsistent with the General Plan or the Capital Improvement Program. Other county policies that may be considered include the Growth Policy. As discussed in Part III.F, the evidence demonstrates that the proposed development would be consistent with the Growth Policy in effect when the present applications were filed. The proposed development would promote the County's housing policy and its Smart Growth policy by creating additional housing within walking distance of Metro. The project might also contribute to the County's stock of affordable housing, but this would depend on whether the number of units built requires MPDUs under whatever standards are in place at the time of site plan review, which is expected to be about eight years away. The Applicants may seek approval at site

plan for a small number of very large units, with no MPDU requirement. Nonetheless, even luxury housing near Metro promotes some county policies.

The Hearing Examiner concludes that the proposed development does not conflict with any county plans or policies.

- (b) ***That the proposed development would comply with the purposes, standards, and regulations of the zone as set forth in article 59-C, would provide for the maximum safety, convenience, and amenity of the residents of the development and would be compatible with adjacent development.***

1. Intent and Purposes of the Zone

The TS-R and TS-M Zones are intended to be used as follows, per Section 59-C-8.21:

- (a) The TS-R and TS-M zones are intended to be used in a Transit Station Development Area as defined in section 59-A-2.1. However, the TS-R zone may also be used in an area adjacent to a Central Business District, within 1,500 feet of a metro transit station, and the TS-M zone may be also be used within a Central Business District if the property immediately adjoins another property outside a Central Business District that is eligible for classification in the TS-M zone or separated only by a public right-of-way from property outside a Central Business District that is eligible for classification in the TS-M zone.
- (b) The TS-R zone is intended for locations where multiple-family residential development already exists or where such development is recommended by an approved and adopted master plan.
- (c) The TS-M zone is intended. . . .[not relevant]
- (d) In order to facilitate and encourage innovative and creative design and the development of the most compatible and desirable pattern of land uses, some of the specific restrictions which regulate, in some other zoning categories, the height, bulk and arrangement of buildings and location of the various land uses are eliminated and the requirement substituted that all development be in accordance with a plan of development meeting the requirements of this division.

The subject property is located within a transit station development area designated in the Sector Plan. It is also in an area where multi-family housing already exists. Thus, the application of the TS-R Zone to the subject property would be consistent with the intent of the zone.

The purpose clause for the TS-R Zone, found in Code §59-C-8.22, is set forth in full below, with relevant analysis and conclusions following:

- (a) To promote the effective use of the transit station development areas and access thereto;
- (b) To provide residential uses and certain compatible non-residential uses within walking distance of the transit stations;
- (c) To provide a range of densities that will afford planning choices to match the diverse characteristics of the several transit station development areas within the county; and
- (d) To provide the maximum amount of freedom possible in the design of buildings and their grouping and layout within the areas classified in this zone; to stimulate the coordinated, harmonious and systematic development of the area within the zone, the area surrounding the zone and the regional district as a whole; to prevent detrimental effects to the use or development of adjacent properties or the surrounding neighborhood; to provide housing for persons of all economic levels; and to promote the health, safety, morals and welfare of the present and future inhabitants of the regional district and the county as a whole.

The evidence amply demonstrates that the proposed development would make effective use of the Bethesda transit station development area by increasing the amount of housing opportunities in close proximity to Metro. The subject site is about 1,200 feet from the Bethesda Metro, less than half a mile away and an easy walk along pedestrian-friendly sidewalks. The proposed development would add to the range of residential densities in the area, which is already quite broad.

Paragraph (d) of the purpose clause sets forth a purpose to “stimulate the coordinated, harmonious and systematic development of the area” and “prevent detrimental effects to the use or development of adjacent properties or the surrounding neighborhood.” These elements effectively make compatibility of the rezoning with the surrounding area an element of the purpose clause. As discussed in detail in Part III.F. above, after a careful review of all of the evidence, the Hearing Examiner concludes that the proposed building would be compatible with nearby buildings and uses, and would be a positive addition to the TS-R District.

For all of the above reasons and based on the preponderance of the evidence, the Hearing Examiner concludes that the proposed rezoning and development would be consistent with the purpose clause of the TS-R Zone.

2. Standards and Regulations of the Zone

The standards and regulations of the TS-R Zone are summarized below, together with the grounds for the Hearing Examiner's conclusion that the proposed development would satisfy each of these requirements.

Section 59-C-8.24, Location. This section repeats Section 59-C-8.21(a), which is discussed in Part V.A.(b)1. above.

Section 59-C-8.25, Public facilities and amenities.

A development must conform to the facilities and amenities recommended by the approved and adopted master or sector plan, including and granting such easements or making such dedications to the public as may be shown thereon or are deemed necessary by the Planning Board to provide for safe and efficient circulation, adequate public open space and recreation, and insure compatibility of the development with the surrounding area, and assure the ability of the area to accommodate the uses proposed by the application.

The Development Plan provides for all of the roadway dedications requested by the Planning Board and its Staff in accordance with the Sector Plan, and all of the public open space and active/passive recreation spaces required under the TS-R Zone. No evidence has been submitted to suggest that any other facilities or amenities were recommended by the Sector Plan or deemed necessary by the Planning Board.

Section 59-C-8.3 Land use. No use is allowed except as indicated in the following use table . . .

The proposed residential use is permitted as of right in the TS-R Zone.

Section 59-C-8.4 Development standards.

As shown in the table below, excerpted from the Staff Report with slight modification, the proposed development would be consistent with the development standards of the TS-R Zone.

TS-R Zone Development Standards, Code § 59-C-8.4

Development Standards	Permitted/ Required	Proposed
Minimum tract area (area to be rezoned)	18,000 sq. ft.	38,079 square feet
Maximum density of dwelling units per acre		
a. Floor area ratio	2.5	Not to exceed 2.0*
b. Dwelling units per acre	150 d.u./acre	Not to exceed 36 d.u./acre*
Open space		
a. Minimum percentage of net area devoted to public use space	10%	Not less than 10%
b. Minimum percentage of net lot area devoted to active and passive recreation space.	25%	Not less than 25%
c. Total minimum open space	30%	Not less than 30%

* Denotes binding elements.

In addition to the provisions cited above, the TS-R Zone includes the following special requirements:

Section 59-C-8.51, Building height limit.

The maximum height permitted for any building shall be determined in the process of site plan review. In approving height limits the planning board shall take into consideration the size of the lot or parcel, the relationship of the building or buildings to surrounding uses, the need to preserve light and air for the residents of the development and residents of surrounding properties and any other factors relevant to height of the building.

No findings necessary at zoning.

Section 59-C-8.52, Off-street parking. Parking shall be so located as to have a minimal impact on any adjoining residential properties.

The Development Plan provides for underground parking.

Section 59-C-8.52, Streets. Interior streets may be private or public but private streets must have a minimum width of 20 feet for two-way traffic and 10 feet for one-way traffic and must be paved and maintained in good repair.

No interior streets are proposed.

Section 59-C-8.54, Ancillary commercial uses. Ancillary commercial uses, as a permitted use or by special exception as set forth in section 59-C-8.3, may be permitted as follows:

(a) The amount of floor area devoted to commercial uses cannot exceed the amount or substantially alter the configuration specified for the site in the applicable master or sector plan.

(b) If the master or sector plan does not make a specific recommendation as to the amount of floor area allowed, then commercial uses are limited to the street level only.

In addition, a restaurant may be permitted on the top or penthouse floor. All commercial uses must be so located and constructed to protect tenants of the building from noise, traffic, odors and interference with privacy.

No commercial uses are proposed.

3. Maximum Safety, Convenience, and Amenity of the Residents

The proposed development would serve the safety, convenience and amenity of site residents by providing a pedestrian-friendly, transit-oriented, urban-style housing option in a vibrant downtown area with a very high level of convenience and amenities.

4. Compatibility

As discussed in detail in Part III.F, the Hearing Examiner concludes that the proposed development would be compatible with existing and planned land uses in the surrounding area.

(c) That the proposed internal vehicular and pedestrian circulation systems and points of external access are safe, adequate, and efficient.

The Staff Report and testimony from the Applicants' traffic expert presented adequate evidence that the garage access and pedestrian circulation systems, which include an improved sidewalk along Arlington Road, would be safe, adequate and efficient.

(d) That by its design, by minimizing grading and by other means, the proposed development would tend to prevent erosion of the soil and to preserve natural vegetation and other natural features of the site. Any applicable requirements for forest conservation under Chapter 22A and for water resource protection under Chapter 19 also must be satisfied. The district council may require more detailed findings on these matters by the planning board at the time of site plan approval as provided in division 59-D-3.

The only natural features on the subject site are one specimen tree on the site proper, which is located near the middle of the site and cannot be saved if the site is to be developed consistent with the Sector Plan, and a group of large trees along the eastern boundary. Technical

Staff concludes that the trees along the eastern boundary cannot be saved due to the development proposed on this site and the neighboring property to the east. The Applicants' land planner testified that these trees would be killed as a result of the development approved on the adjoining property, regardless of what happens on the subject site. In the Hearing Examiner's view, having already approved the development on the adjoining property, fairness argues that the District Council should not deny or remand the present application in an effort to save the trees.

The present applications are exempt from forest conservation regulations. An approved stormwater management concept plan provides sufficient evidence that the water resource requirements of Chapter 19 would be satisfied.

(e) *That any documents showing the ownership and method of assuring perpetual maintenance of any areas intended to be used for recreational or other common or quasi-public purposes are adequate and sufficient.*

The Applicant has submitted draft homeowner's association documents that are adequate and sufficient to ensure perpetual maintenance of common areas, as well as testimony by Mr. Rothstein asserting that a condominium board of directors would have responsibility for such maintenance.

B. Public Interest

The applicant must show that the proposed reclassification bears sufficient relationship to the public interest to justify its approval. The State Zoning Enabling Act applicable to Montgomery County requires that all zoning power must be exercised:

“. . . with the purposes of guiding and accomplishing a coordinated, comprehensive, adjusted, and systematic development of the regional district, . . . and [for] the protection and promotion of the health, safety, morals, comfort, and welfare of the inhabitants of the regional district.” [*Regional District Act*, Maryland-National Capital Park and Planning Commission Article (Art. 28), Md. Code Ann., § 7-110].

When evaluating the public interest, the District Council normally considers master plan conformity, the recommendations of the Planning Board and Technical Staff, and any adverse impact on public facilities.

For the reasons stated in Part III.F. above, the Hearing Examiner agrees with the Planning Board and Technical Staff that the subject application would be in substantial compliance with the recommendations and objectives of the *Bethesda CBD Sector Plan*.

The evidence supports a conclusion that utilities are adequate to accommodate the proposed development, and that the impact on public schools and roadways would be very minor. For all of the above reasons, the Hearing Examiner concludes that approval of the requested zoning reclassification and development plan amendment would serve the public interest.

VI. CONCLUSIONS

Based on the foregoing analysis and after a thorough review of the entire record, I reach the conclusions specified below.

A. Development Plan and Development Plan Amendment

1. The requested reclassification to the TS-R Zone is in substantial compliance with the use and density recommended by the *Bethesda CBD Sector Plan* and does not conflict with the county capital improvements program or any other county plan or policy.

2. The proposed Development Plan/Development Plan Amendment complies with the purposes, standards, and regulations of the TS-R Zone and provides for a form of development that will be compatible with adjacent development.

3. The Development Plan proposes internal vehicular and pedestrian circulation systems and a point of external access that would be safe, adequate and efficient.

4. The proposed development would prevent soil erosion and preserve natural vegetation to the degree possible in light of the limitations of the site and adjacent development. The proposed development is exempt from forest conservation requirements under Chapter 22A. Requirements for water resource protection under Chapter 19 would be satisfied.

5. The submitted documentation of the intended ownership and method of perpetual maintenance of areas to be used for common or quasi-public purposes is adequate and sufficient.

B. Zoning Request

Application of the TS-R Zone at the proposed location is proper for the comprehensive and systematic development of the County because the proposed development, as shown on the submitted Development Plan:

1. Will serve the public interest;
2. Will be in substantial compliance with the applicable sector plan; and
3. Will fully satisfy the purposes, standards and regulations of the zone.

VII. RECOMMENDATION

I, therefore, recommend that (1) Zoning Application No. G-865, which requests reclassification from the R-60 Zone to the TS-R Zone of 8,342 square feet of land located at 7425 Arlington Road in Bethesda, in the 7th Election District, known as Part of Lot 31, Block 13, Edgemoor subdivision be **granted** in the amount requested, and that (2) Development Plan Amendment Application No. DPA 07-3, requesting to amend the development plan that was approved by the District Council in Application G-779 in February, 2001, to add to the plan the property located at 7425 Arlington Road and to change the form of development to a four-story, multi-family residential building with up to 31 dwelling units and a maximum FAR of 2.0, be **approved** as requested, with both approvals subject to the specifications and requirements of the final submitted Development Plan, Exhibit 95(a); provided that the Applicants submit to the Hearing Examiner for certification a reproducible original and three copies of the Development Plan approved by the District Council, Exhibit 95(a), with the changes to the binding elements and notes that were handwritten at the July 2, 2008 hearing added in the same type as the existing text, within 10 days of approval, in accordance with § 59-D-1.64 of the Zoning Ordinance.

Dated: September 15, 2008

Respectfully submitted,

Françoise M. Carrier
Hearing Examiner

Appendix A

Artist's Rendering of Proposed Building and Other Buildings Along Arlington Road

Appendix A

Proposed Building, Arlington Road Frontage, from Ex. 95(b-1)



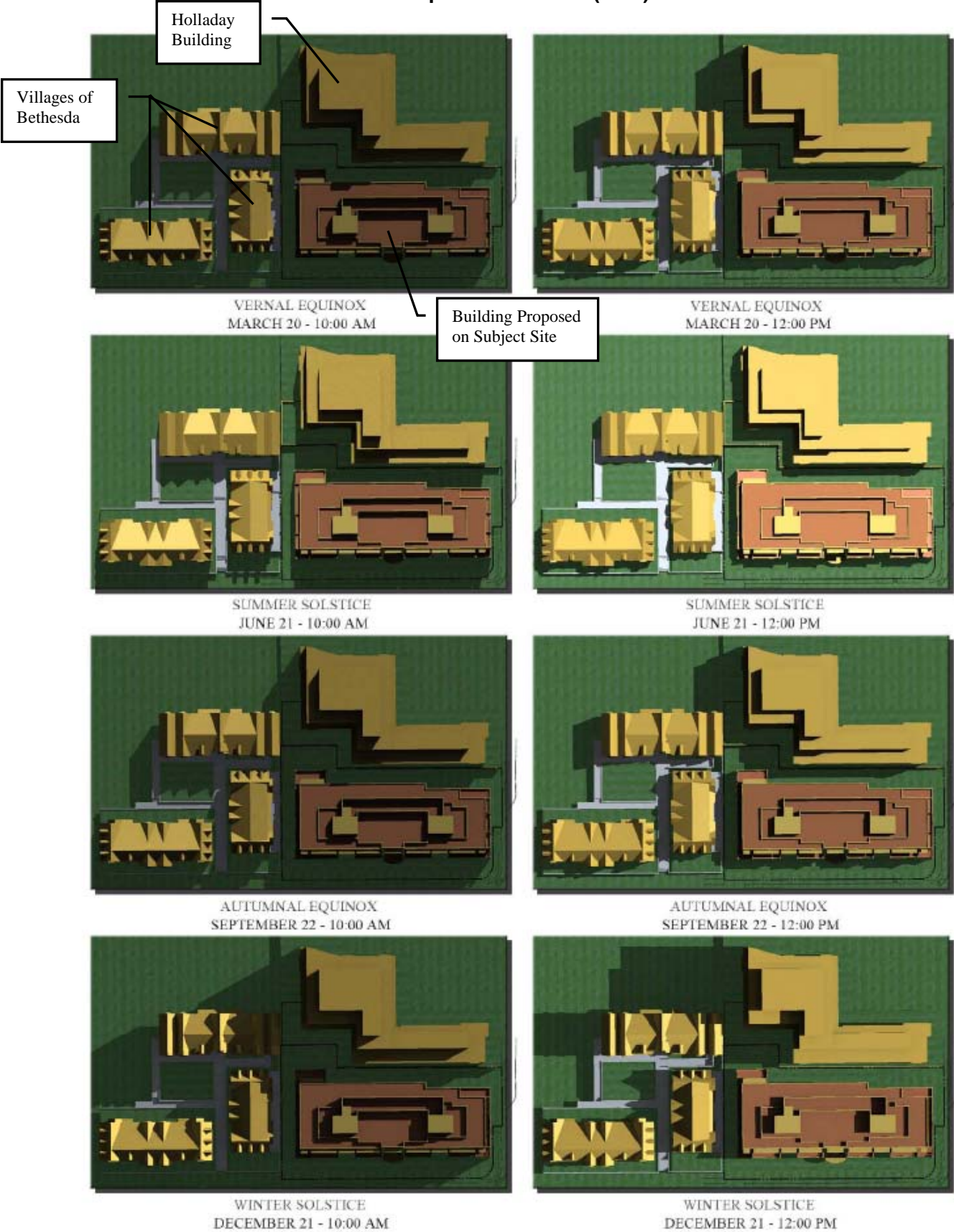
Artist's Rendering of Buildings along Arlington Road with Proposed Development, from Ex. 102



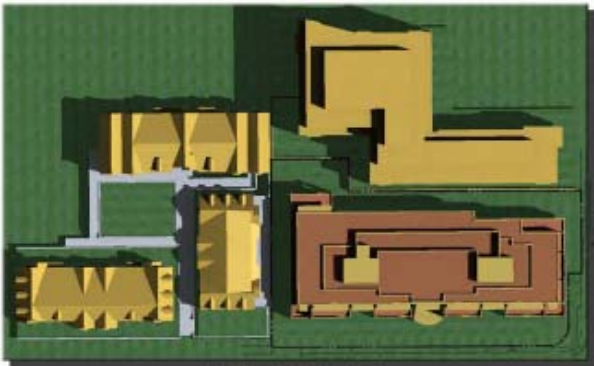
Appendix B

**Shadow Study Showing Villages of Bethesda, Building Proposed on
Subject Site and Building Approved on Adjacent Holladay Property**

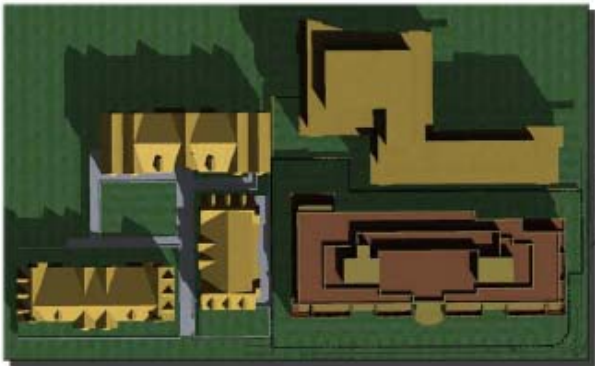
Morning and Noon, Four Seasons, Planimetric View (Straight Overhead)
Excerpted from Ex. 95(d-10)



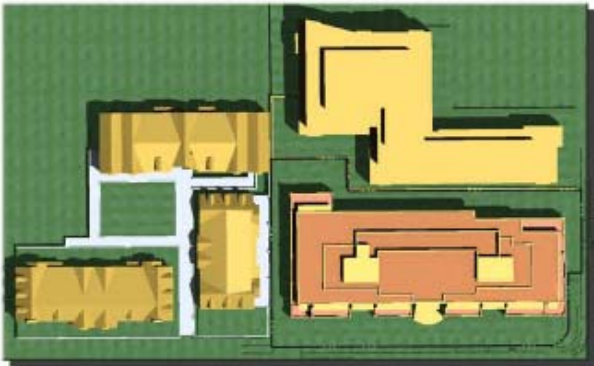
Mid-Afternoon and Late Afternoon, Four Seasons, Planimetric View (Straight Overhead)
Excerpted from Ex. 95(d-10)



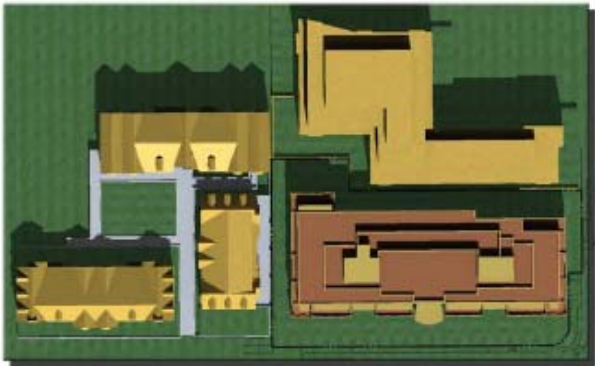
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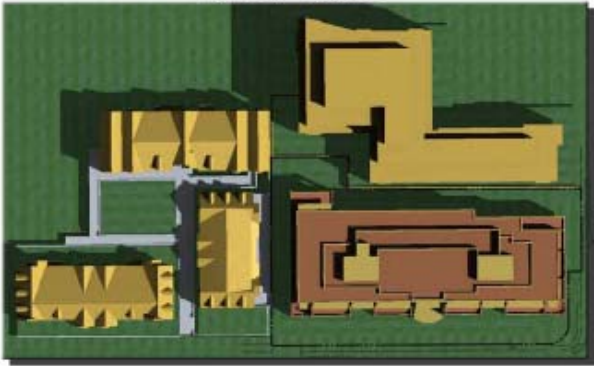
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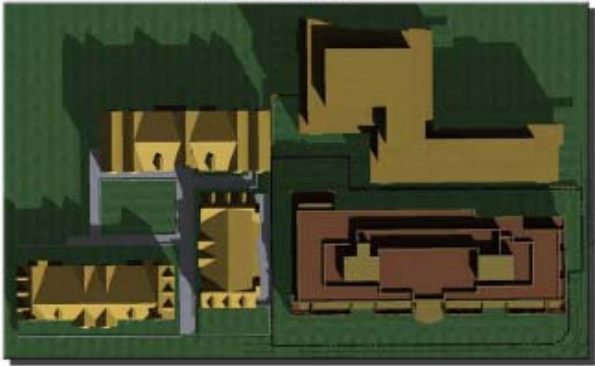
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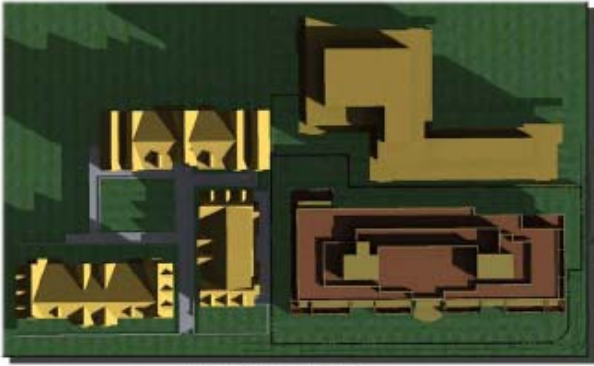
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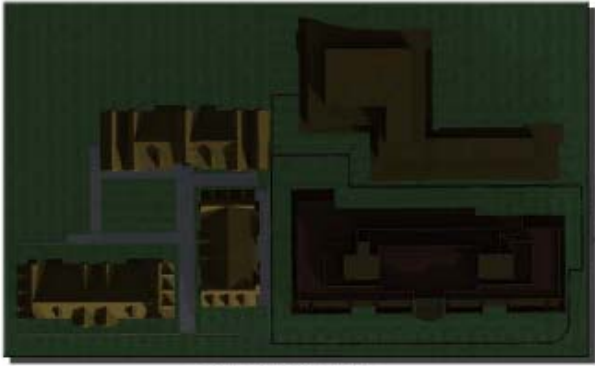
AUTUMNAL EQUINOX
SEPTEMBER 22 - 2:00 PM



AUTUMNAL EQUINOX
SEPTEMBER 22 - 4:00 PM



WINTER SOLSTICE
DECEMBER 21 - 2:00 PM



WINTER SOLSTICE
DECEMBER 21 - 4:00 PM